BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
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In the Matter of the Applications of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement – Phase 3 Project in Minnesota from the North Dakota Border to the Wisconsin Border	**OAH Docket No. 65-2500-32764** **MPUC Docket No. PL-9/CN-14-916**
In the Matter of the Applications of Enbridge Energy, Limited Partnership for a Routing Permit for the Line 3 Replacement – Phase 3 Project in Minnesota from the North Dakota Border to the Wisconsin Border	**OAH Docket No. 65-2500-33377** **MPUC Docket No. PL-9/PPL-15-137**

REPLY BRIEF OF THE SIERRA CLUB

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TABLE OF CONTENTS

INTRODUCTION

Sierra Club submits this Reply Brief in response to the January 23, 2018 Initial Briefs of Enbridge Energy, Limited Partnership ("Enbridge" or "Applicant") and intervening parties in the above captioned dockets. We limit this Reply Brief to responding to arguments and clarifying information raised in other parties' initial briefs and do not repeat all the arguments laid out in Sierra Club's Initial Brief.[1]

The record is clear that Minnesota's energy needs are not dependent on the tar sands oil that Enbridge wants to transport across the state by building a Line 3 "replacement" pipeline ("L3R pipeline" or "Project"). State energy needs are increasingly met by clean renewable energy that is cheaper, more economically beneficial, less environmentally harmful, and more aligned with Minnesota's goals for energy independence and greenhouse gas reductions than using oil. At the same time, both regional and Minnesotans' demand for gasoline is on the decline and easily met by existing infrastructure, especially as the adoption of electric vehicles accelerates and becomes more widespread in response to dropping prices and growing convenience. By its own admission, Enbridge's proposed L3R pipeline will supply tar sands oil from Canada to meet regional demand for asphalt and global demand for crude oil. Enbridge has provided insufficient evidence on the record that the tar sands oil it wants to transport through Minnesota's northern watersheds is necessary to the future adequacy, reliability, or efficiency of energy supply to meet local or regional need. As such,

[1] Sierra Club Initial Br. (Jan. 23, 2018) (eDocket Nos. 20181-139263-04 (CN); 20181-139263-03 (R)).

Enbridge has failed to make the statutory and regulatory showings required to obtain a Certificate of Need ("CN").

Enbridge can cite to prior Commission proceedings where oil pipeline applicants have gotten a Certificate of Need. Those prior decisions are irrelevant to the extent that the facts before the Commission are different in this case. In those past proceedings, Minnesota was still in the process of transitioning its electrical system away from dependence on crude oil. Today in 2018, that transition is close to complete, and no new oil infrastructure is needed to meet Minnesota's energy needs.

The Minnesota Legislature created the Commission to regulate natural gas and electrical utilities with customers in Minnesota, and as its first order of business made the Commission oversee utilities' need to construct facilities to assure the future energy needs of the state.[2] The Commission is not empowered by any law to permit the construction of a large tar sands pipeline through the state based only on foreign refiners' demand for crude oil. The Commission is also not empowered to permit the construction of such a pipeline where there is no showing by the applicant that there is a need for the facility's production of "energy" that will meet the needs of Minnesota ratepayers. Enbridge's existing infrastructure (and indeed, the redundant systems of its many American competitors) is more than enough to handle the regional demand for crude oil-based energy—it is even enough to meet the non-energy demand for asphalt and lubricants, as gasoline demand plummets and refiners have progressively less product to sell.

[2] Sierra Club Initial Br. at 3 (citing Minn. Stat. § 216B.01 (2017)).

Instead of making a showing of energy demand among utility customers, Enbridge seeks to recast its business convenience as Minnesota's need. Worse than having no benefit to the people of Minnesota, granting Enbridge a CN places Minnesotans at risk by imperiling their environment and health and, for some, their cultural heritage. Indeed, the Commission and the statutory requirement for a CN exist precisely to block the construction of dangerous and unnecessary projects like the proposed Project.

In testimony[3] and our Initial Brief,[4] Sierra Club proved conclusively that renewable energy obviates any energy need for the proposed L3R pipeline and is a viable, more beneficial, and less costly alternative to the proposed pipeline for meeting any forecast energy need in Minnesota. Enbridge never rebutted this testimony. Instead of repeating these arguments, this Reply Brief instead addresses the flaws of the legal framework adopted by Enbridge and some other parties and explains why regarding the proposed Project as a "replacement" for the continued operation of old Line 3 pipeline is a false narrative that the Commission should disregard. Due to the failures of Enbridge's proffered evidence and misreading of the law, the Commission should deny its CN application.

[3] *See generally* Ex. SC-4 (Twite Rebuttal).

[4] Sierra Club Initial Br. at 32–34. Other intervenors, including the Youth Climate Intervenors and the White Earth Band of Ojibwe and Red Lake Band of Chippewa have also shown in their initial briefs that renewable energy alternatives are in all ways preferable to the proposed Project.

ARGUMENT

These proceedings are unlike any other the Commission has undertaken in the past.[5] As the Applicant noted, "the record available to the Administrative Law Judge and the Commission concerning the issuance of the CN and Route Permit is likely more extensive than any project previously considered by the Commission."[6] This is not for want of attempts by the company to shorten and rush the process—including its assertion that an Environmental Impact Statement was not required before the issuance of a Certificate of Need, forcing the Court of Appeals to step in and direct the Commission to return to the drawing board and engage in these proceedings.

The Commission cannot grant Enbridge's CN application on the basis of the length or intensity of the permitting process, the volume of the record, or the issuance of past permits for other pipelines, as none of these are statutorily valid justification for granting a CN. The duty of the Commission is, rather, to give effect to the statutory obligations delegated to it. Contrary to Enbridge's position in this case,[7] the Commission is bound by law to protect Minnesota's people and resources.

Given that these proceedings place the Commission in uncharted territory, it is especially important that the Commission base its decision on the requirements of the law

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[5] Enbridge Initial Br. at 54 (Jan. 23, 2018) (quoting DOC-DER witness O'Connell stating "I'm not aware of any case that have facts that are the same as the facts we're seeing in this proceeding.") (eDocket Nos. 20181-139252-03 (CN); 20181-139252-04 (R)).
[6] *Id.* at 16.
[7] *Id.* at 85 (asserting that Friends of the Headwaters' position that the Commission protect Minnesota's northern water resources "should be rejected" because it values Minnesotan resources highly).

rather than rubber-stamping the applications before it or accepting a false reading of the law.[8]

The Commission may only grant a CN in accordance with the scope of the powers given to it by the Legislature, and Section I of this brief responds to other parties' positions on the applicable statutes. As discussed extensively in Sierra Club's Initial Brief and further elaborated in Section II of this Reply Brief, Enbridge fails to make this its required showing of need. Instead, Enbridge tries to demonstrate need for the proposed project based on considerations that are legally insufficient and invalid for the Commission to grant a CN. These include demand for asphalt and other non-energy refined products and Enbridge's and its shippers' private economic interests. In Section III, this brief addresses parties' arguments about the socioeconomic and cultural impacts of the project. Finally, Section IV discusses how parties are incorrect in assuming Enbridge will comply with the law because both its proposed and existing pipelines are in violation of Minnesota's environmental laws. Based on the record before it, the Commission must reject Enbridge's CN application.

I. THE COMMISSION IS BOUND BY THE LEGISLATURE'S STATUTORY DIRECTIVES ON THE ISSUANCE OF A CERTIFICATE OF NEED FOR AN OIL PIPELINE

Sierra Club disagrees with the assertions in some parties' initial briefs that the Commission may somehow disregard some of the evidentiary obligations that are imposed on it or on the Applicant by Minnesota Statute Section 216B.243. For example, Honor the

[8] The applicant encourages this result by asserting that "In *every* crude oil pipeline proceeding in its history, the Commission has conducted a straightforward analysis of the record under these criteria and has granted the applicant a CN." *Id.* at 17.

Earth suggested that "legislative sloppiness" in Minnesota Statute Section 216B.243, Subdivision 3 makes the application of that section "problematic" and encouraged the Commission to see past that statutory language.[9] While Sierra Club agrees that the "Minnesota Legislature . . . included approval of crude oil pipelines within the State's certificate of need law, Minn. Stat. § 216.243, which is written to apply to electricity generation and transmission facilities, but did so without modifying this law to recognize that crude oil pipelines are substantially different from electricity generation and transmission facilities,"[10] we disagree that there is legislative intent that indicates portions of the statute should not be given effect. We certainly see no justification for a reading of the CN statute such that Enbridge has a lighter evidentiary burden than the Legislature commanded in the clear language of the statute.[11] The Commission's duty is to follow the law before it, not disregard sections that require Enbridge to prove a need for electrical energy. Minnesota Statue 216B.243, Subdivision 3, states unambiguously: "No proposed large energy facility shall be certified for construction unless the applicant can show that *demand for electricity* cannot be met more cost effectively through energy conservation and load-management measures and unless the applicant has otherwise justified its need." (emphasis added)

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[9] Honor the Earth Initial Br. at 15, n.26 (Jan. 23, 2018) (eDocket Nos. 20181-139262-02 (CN); 20181-139262-01 (R)) [hereinafter HTE Initial Br.].
[10] *Id.*
[11] Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions. When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

Furthermore, Sierra Club's Initial Brief laid out the legislative history underlying the Commission's regulatory authority over all Large Energy Facilities in need of a CN, including large oil pipelines.[12] Even if there were any ambiguity in the statute's express language, this history demonstrates that the Minnesota Legislature imposed CN requirements on oil pipelines explicitly and exclusively as an energy input to electrical utilities.[13]

Similarly, it is impermissible for the Commission to make a decision on a CN application based solely on its reading of the applicant's evidentiary obligations under Minnesota Rule 7853.0130 to the exclusion of other evidentiary requirements and its own legal obligations that are imposed by the CN statute and other applicable statutes.[14] Indeed, Minnesota Statute Section 216B.243, Subdivision 2, provides that:

> No large energy facility shall be sited or constructed . . . without the issuance of a certificate of need by the commission pursuant to sections 216C.05 to 216C.30 and this section and consistent with the criteria for assessment of need.

The Legislature's use of "and" means "and," so the Commission is required to meet all the statutory requirements before granting a CN and could still deny a CN even if an applicant did meet its burden under rule.

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[12] Sierra Club Initial Br. at 3-7, 8.

[13] Minn. Stat. § 645.16 ("When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters: (1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; . . .").

[14] *Contra* Department of Commerce Division of Energy Resources Initial Br. at 6 (Jan 23, 2018) (eDockets No. 20181-139259-02 (CN)) ("Because Minnesota Rules are more detailed than corresponding statutory need criteria, DOC DER uses the rule criteria in Minn. R. 7853.0130 as a framework for evaluating Enbridge's compliance with the legal criteria.") [hereinafter DOC-DER Initial Br.].

Sierra Club finds itself in agreement with the Applicant's assertion of the controlling law: "[T]he Commission is a creature of statute and has only those powers given it by the Legislature. In the case of a proposed large energy facility for which an applicant seeks a CN, the Legislature has clearly provided that the Commission has two options: approval or denial."[15] Under the governing statutory requirements and based on the record before it, the Commission is both empowered and obligated to deny Enbridge's permit applications. Enbridge claims in its Initial Brief that "the burden falls squarely on *other* parties to establish that an alternative – including the no action alternative . . . –provides a '*more reasonable and prudent alternative'* that the Project."[16] This is not a correct statement of the law. The only thing Enbridge offers as support for its claim is one unreported case involving a different Commission regulation and arising from a dispute between a municipal utility applicant and a natural gas company intervenor.[17] This case is distinguishable for many reasons,[18] including that the Commission's action was pursuant to its different authority over natural gas utilities and that the public interest cut against the private company intervenor in that case but is for the public interest intervenors in this proceeding.

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[15] Enbridge Initial Br. at 19 (citation omitted).
[16] *Id.* at 18.
[17] *See In the Matter of the Application of the City of Hutchinson (Hutchinson Utilities Commission) for a Certificate of Need to Construct a Large Natural Gas Pipeline*, 2003 WL 22234703, at *7 (Minn. Ct. App. Sept. 23, 2003); Enbridge Initial Br. at 173 (Attachment A); *id.* at 19 n.69. An unreported case is not controlling on any agency, and it is only helpful guidance to the extent that it is not distinguishable. In addition to the fact that the intervenor in that case was a private company trying to assert its claim against a municipal utility, it was also operating under the Commission's rules for natural gas utilities, which is a different set of authorities than the ones Enbridge needs to comply with here.
[18] *See id.*

One need not go further than the plain language of the CN statute to see there is no support for Enbridge's position on the burden of proof for demonstrating alternatives. Minnesota Statute Section 216B.243, Subdivision 3 requires that "the commission shall evaluate" all of the applicant's case against its objective standards, and Section 3a forbids Commission approval until "the applicant for the certificate has demonstrated to the commission's satisfaction that it has explored the possibility of generating power by means of renewable energy sources and has demonstrated that the alternative selected is less expensive (including environmental costs) than power generated by a renewable energy source." Enbridge's interpretation of the governing law places it in conflict with the CN statute. Under the statute, the Commission is obligated to evaluate possible alternatives to the proposed project,[19] and the applicant must disprove the possible renewable alternative convincingly to the Commission,[20] and there is nothing in the statute about the burden of proving those alternatives resting with the other parties. Furthermore, if the burden of proof for demonstrating alternatives were placed solely on intervening parties, then the Commission would always be in violation of its statutory obligation to evaluate alternatives when a CN docket is before it without any intervening parties.

As discussed in Sierra Club's Initial Brief, Section 3a of the CN Statute expressly provides that the Commission must not issue a CN for the proposed pipeline unless Enbridge has made a detailed and convincing showing to rebut other parties' evidence on this issue.[21] Sierra Club's Initial Brief explained, Enbridge's representatives admitted

[19] Minn. Stat. § 216B.243, subd. 3(6) (2017).
[20] Minn. Stat. § 216B.243, subd. 3a (2017).
[21] Sierra Club Initial Br. at 7.

repeatedly on the record that it has not offered evidence regarding a renewable energy alternative and offered no evidence that could rebut Sierra Club's testimony on this matter.

Enbridge's interpretation of the burden of proof for alternatives would also create conflict between the Commission's CN rules and its obligations under the Minnesota Environmental Policy Act (MEPA) which requires that an agency deny a permit for a project if there exists a reasonable and prudent alternative that is more environmentally sound, even if it is more expensive.[22] The obligation for identifying and evaluating such alternatives under MEPA rests squarely with the Commission. Under Enbridge's interpretation of the burden of proof, the Commission may be required under MEPA to deny a CN based on the existence of a reasonable and prudent alternative but required under the CN Rules to the grant the CN if that alternative was not introduced into the record by an intervening party. This is further problematic in light of the Minnesota Environmental Rights Act (MERA) which grants any private party or local government the right to sue the Commission in district court over any permitting decision that the plaintiff can show has or likely to have adverse environmental impacts[23] and makes the lack of a reasonable and prudent alternative the Commission's only affirmative defense.[24]

The Commission cannot change something as fundamental as the burden of proof to the opposite of what the Legislature required it to find before it grants any CN. In this

[22] Minn. Stat. § 116D.04, subd. 6.
[23] Minn. Stat. § 116B.03.
[24] Minn. Stat. § 116B.04.

respect, Sierra Club agrees with Honor the Earth's Initial Brief—the regulations must be read to be consistent with the statutory directives.[25]

II. ENBRIDGE HAS FAILED TO MAKE NECESSARY SHOWINGS OF NEED IN THE RECORD AND ADMITS THESE FAILURES IN BRIEFING

As several parties noted and the applicant concedes, Enbridge bears the burden of proof on every element of its case.[26] In order to make a basic showing for the Commission to vet, Enbridge must show by preponderance of the evidence that its proposed Project meets Minnesota's energy needs pursuant to Minnesota Statute 216B.243 and Minnesota Rule 7853.0130(A).[27] Sierra Club's Initial Brief discusses how the company has failed to meet its burden, and this analysis will not needlessly repeat points made in that document.

Importantly, nothing in the statue allows the Commission to take purely private corporate desires and translate those wants into cognizable "need" for energy infrastructure. When you have a hammer, everything starts looking like a nail. While the applicant's only business is moving oil internationally and domestically for its shippers,[28] it makes sense that it can only see an oil-based future where it will continuously make more money. But the

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[25] *See* HTE Initial Br. at 20 (explaining that the meaning of "need" must be a public interest and not a private commercial need in light of the statutory structure that the Commission is required to apply).

[26] Enbridge Initial Br. at 18.

[27] Sierra Club Initial Br. at 6.

[28] Of course Enbridge's application and Mr. Eberth's testimony lauded the parent company for its forays into clean energy, but the applicant here is merely a wholly-owned subsidiary who does no such business. The one Electric Vehicle charging station that Mr. Eberth claims Enbridge has paid for in Duluth is a fitting metaphor for the applicant's commitment to the state's energy future—utterly symbolic and insufficient to meet the demand that is already evident in current society.

statue does not let the Commission off this easily. The Commission must balance the many countervailing values and facts that the Legislature has deemed relevant.

Minnesota Statute Section 216B.243, Subdivision 3(1) requires the Commission to vet, and therefore for Enbridge to provide, "long-range energy demand forecasts on which the necessity for the facility is based." Granting Enbridge a CN would require the Commission to accept the Applicant's distorted definitions of "energy," "demand," and a wholly private-corporation profit-based version of "need." This section responds to Enbridge and the Shippers regarding the Applicant's failure to show any demonstrable need for energy based on relevant demand.

A. Enbridge Has Not Addressed Parties' Arguments that an Oil Glut Is Likely to Occur During the Life of the Project, Erasing any Societal or Business Need for the Project

As an initial matter, it is helpful to recognize that Enbridge's case falls apart if its corporate customers abandon it or fail to find working with it profitable and take their business elsewhere. Unlike other utility proceedings, nothing is keeping these customers interested in tar sands oil other than the projected price it will fetch. Many parties have pointed to the fact that Enbridge's expert analysis and modeling fails to the extent that it ignores the possibility of a worldwide oil glut that lowers the global price of oil.[29] Such a glut is likely owing to national policies favoring the domestic production of oil in the coming

[29] *See*, *e.g.* DOC-DER Initial Br. at 11 (discussing Enbridge's witnesses' unrealistic modeling that any and all oil will be exported, regardless of global refined product demand and the potential for a worldwide glut); *id.* at 26–29; Friends of the Headwaters Initial Br. at 10 (Jan. 23, 2018) (eDockets Nos. 20181-139258-02 (CN); 20181-139258-01 (R)) (discussing current conditions in Minnesota and globally as an oil glut) [hereinafter FOH Initial Br.].

years.[30] The economics of Canadian oil will likely be harmed by the overproduction of American reserves, and will therefore remain unprofitable to ship to U.S. markets and third countries.

Enbridge admits that Minnesota is already taking a large part of its oil inputs from domestic sources. It notes that regional refineries depend on domestically produced oil[31] and are not exclusive Enbridge customers. The infrastructure that currently brings domestic oil is available to continue and possibly increase those inputs, locking more expensive and destructive tar sands oil out of our market.

B. Enbridge Has Not Shown any Need for "Energy" in Minnesota

Enbridge asserts that, even as electric vehicles lessen demand for gasoline and reduces refined product demand, its proposed Project will remain at a high utilization rate.[32] This ignores exactly what it is being utilized for,[33] and what markets it is intended to serve. Since there is no showing that this future demand for oil will be used for energy, and the most credible evidence in the record shows the opposite, the self-serving argument that does not project any demand for energy in any form fails for being irrelevant to the legal standard before the Commission.

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[30] Sierra Club Initial Br. at 44–48 (discussing current Trump Administration policies to promote domestic energy production and oil extraction beyond any level before seen, and to the exclusion of foreign sources for oil).
[31] Enbridge Initial Br. at 23 (noting that refineries in Wisconsin and North Dakota depend on both U.S. and Canadian oil).
[32] *Id.* at 48, 64.
[33] *See id.* at 90 (stating that with high Electric Vehicle adoption there will be no substantial impact to "the State's overall energy portfolio," conflating that portfolio with production of gasoline, diesel, and "other refined products").

Enbridge has a very loose idea of what "energy" means.[34] It acknowledges that its oil gets turned into transportation fuels as well as "asphalt, and other petroleum based products,"[35] but never seeks to show how this mix of refined products counts as energy under Minnesota law.[36] In terms of "renewables," it only discusses ethanol as a replacement for its products but says that demand for the full basket of refined products will not be changed by ethanol availability.[37] It fails to make any claims regarding renewable energy such as wind and solar generation.

Enbridge cites to its expert's testimony, which appears to equate "energy" with gasoline,[38] and makes no effort to show how its oil will serve the electrical energy system. This understanding of "energy" is not supported by the Commission's organic statute and the legislative findings that accompanied that law.[39] This understanding of "energy" is also

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[34] *Id.* at 33–34 (stating that a NEB quote regards the "beneficial impact on reliability of energy supply" where the quote did not discuss energy and instead asserted that a new pipeline would have higher pressure and less upkeep).

[35] *Id.* at 40; *id.* at 114 (noting that in addition to vehicle fuel "crude oil can be refined into a wide array of other products, ranging from asphalt to medical supplies, prosthetics and implants, PVC pipe, laminated windshields, nylon airbags, polyester seatbelts, car seats, bicycle frames, and many more products").

[36] It continues to assert, as it did in testimony, that because it transports crude oil and not refined product it does not need to show any need for refined product. *Id.* at 48.

[37] *Id.* at 62.

[38] *Id.* (describing gasoline consumed as percentage of the "total Minnesota energy supply"); *id.* at 63; *id.* at 89.

[39] The Commission exists to "to provide the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates." Sierra Club Initial Br. at 5 (quoting Minn. Stat. § 216B.01 (2017) and the same language in 1974 Minn. Laws 890, 890-91). Also, as stated in Sierra Club's Initial Brief, the Legislature found that the Commission must use its authority to further "energy planning, protection of environmental values, development of Minnesota energy sources, and conservation of energy." Sierra Club Initial Br. at 5 (quoting 1974 Minn. Laws 494, 494-95). The fact that the Legislature was intent on finding ways to develop Minnesota energy sources strongly suggests it wasn't merely talking about gasoline, and the other values evidenced by these findings argue

contrary to national policy that existed before the Commission was created and in the years that it first interpreted the Certificate of Need law and promulgated its relevant regulations.[40] But even if the Commission views gasoline as "energy," Enbridge disavows any connection between gasoline demand and the pipeline utilization it relies upon as "need." Its discussion of gasoline qua energy is a fig leaf, attempting to cover for an utter lack of analysis of the demand for *energy* in Minnesota as opposed to the business demand for oil in the global market. Oil is not energy unless it is refined and then used for energy purposes, but Enbridge's analysis and expert modeling ignores this completely.

C. Enbridge Does Not Make a Showing of Energy "Demand" But, Rather, Seeks to Skate by Modeling Supply and Assuming Utilization

Because Enbridge cannot demonstrate demand for its tar sands oil, it instead showed its preferred forecast of oil supply and the potential for pipeline utilization. Absent from its case in chief is any showing of a Minnesota demand for this oil. This is why it is limited to theorizing about what Flint Hills meant in several public comments[41] to breathe life into its baseless assertion that there is demand for the Project in the state of Minnesota.

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strongly in favor of the development and use of renewable energy and conservation in the state's energy system, both of which are contrary to Enbridge's position now.

[40] Sierra Club Initial Br. at 10–15.

[41] Enbridge Initial Br. at 34–38. Enbridge asserts that "It is difficult to conceive how Flint Hills could more clearly state its view that the Project is necessary to support the adequacy, reliability, and efficiency of energy supply to Minnesota and neighboring states," *id.* at 38, after quoting Flint Hills stating that it merely has a "preference" for using the Mainline and that if it didn't receive oil from Enbridge it would turn instead to "*crude by rail, river vessel, or perhaps other pipeline projects*." *Id.* at 37 (emphasis in original). Enbridge's lack of imagination notwithstanding, Flint Hills easily could have said that it needed this source of oil and it did not—mere preference is not need.

Enbridge rests its case for demand on the fact that its chosen forecast shows that *supply* will remain strong, asserting "strong levels of crude oil supply will be available to the Minnesota and Midwestern refineries throughout the forecast period, supporting full utilization of the Project."[42] It later asserts that "the Project will be fully utilized, demonstrating its need"[43] and goes on to discuss supply forecasts through a large part of its Initial Brief. But neither crude oil supply nor potential for utilization says anything about society's demands for energy. Enbridge does assert that it has shown demand of a sort, but it is only shipper demand for crude oil[44] and not any customer's need for energy.

D. Enbridge's Shippers Asserted "Need" Is a Purely Private Interest Between Corporations

Both Enbridge and the Shippers are frank in their admission that their feared "apportionment" is merely an inconvenience they would like to put behind them, as it cuts into their profitability and that they would prefer to have lower and more certain costs in the future. A mere showing of volatility in oil shippers' costs is not a demonstration of "need" under Minnesota law, and even a commercial want for better service is not a showing of society's need for energy.

At its root, Enbridge's argument relies on the assumption that only Enbridge is able to supply these customers with oil, and that is not the case. The Applicant has forecast apportionment above 25 percent "in all years through 2035" and asserts that the Project is "forecast to significantly reduce the apportionment on the Enbridge Mainline System."[45] It

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[42] *Id.* at 23.
[43] *Id.* at 25; *see also id.* at 28 (same).
[44] *See*, *e.g.*, *id.* at 89 ("no alternative brought forward meets the need for crude oil").
[45] *Id.* at 31.

presents additional Enbridge capacity as the "only means by which *Enbridge* can ameliorate the negative impacts on the adequacy of supply to its shippers due to apportionment."[46] But Enbridge could never solve this problem for its shippers partly because its shippers include any qualified shipper who presents itself as willing to ship oil, and it cannot treat shippers differently from one another.[47] Thus, its shipper base could always grow beyond its capacity and further force up apportionment.

Enbridge argues that international demand is sufficient to show need because as a common carrier it has committed to inconvenience local refineries based on orders by foreign companies. The fact that it is contractually committed to giving Minnesota refineries poor service in the future is Enbridge's problem, not the Commission's, and Minnesota refineries stand ready to find a better source for their oil needs.[48] The Commission's inquiry is not whether Enbridge can solve global problems and meet global oil demand but whether Minnesotans need additional energy.

Enbridge's Initial Brief shows that, even if the Commission deems gasoline to be "energy" within its mandate, Minnesota refineries have alternative sources for oil and any pipeline Enbridge builds that delivers beyond Clearbrook[49] will, under Enbridge's theory of

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[46] *Id.* at 31 (emphasis added); *see also id.* at 53 (stating that "The Mainline . . . cannot keep pace with demand" from "the Midwest and elsewhere," a global market).
[47] *Id.* at 32. In fact, Minnesota refiners' future exposure to apportionment risk is based on the fact that if any other shipper decides to, it can cut their service by electing to ship more. *Id.* ("even if the Minnesota refineries' demand held flat, if other shipper demands increase even further beyond the capacity of the pipeline system, the Minnesota refineries will have their deliveries further reduced."). Enbridge's forecast apportionment crisis is a function of its relationship with shippers and not at all based on local demand for energy.
[48] *See* discussion in Sierra Club Initial Br. at 27–28.
[49] Enbridge Initial Br. at 90 (explaining that the only pipeline input for Minnesota refineries is Enbridge's supply to Clearbrook).

apportionment, harm Minnesota refiners by opening them up to competition for pipeline capacity with downstream shippers.[50] Thus, even taking all of Enbridge's arguments at face value, there is only a social need for a pipeline to Clearbrook with capacity limited to the potential demand from Minnesota refineries—Enbridge has not met its burden to justify any pipeline capacity past Clearbrook under the statutory standards.

1. Apportionment by itself is not "need"

Although Enbridge claims that reducing apportionment "allow[s]" Minnesota refineries "to receive more of the crude oil supplies they need to meet customer demand,"[51] it fails to link up this allowance to the company's actual needs. Indeed, as Sierra Club briefed already, it is entirely possible to read Flint Hills' absence from this case and ambivalent letters to say that it is not interested in this Project (although still interested in continuing use of the Main Line and generally against the concept of apportionment).[52] To call its letters "compelling evidence"[53] is to lower the bar for evidence beyond a reasonable reading of the statutory duties on the applicant. While Flint Hills continues to support the Project in the occasional letter filing,[54] its support is based on current business realities and it is open to other sources for its oil.

Enbridge is wrong to state that apportionment means that shippers "are not receiving the supply of crude oil via pipeline that they need"[55] because, if you ask the shippers, all it

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[50] *See id.* at 91 (quoting Andeavor's letter stating that the Project will equally serve oil to Minnesota, the region, "and all those downstream who rely on the Enbridge system").
[51] *Id.* at 20.
[52] Sierra Club Initial Br. at 27–28.
[53] Enbridge Initial Br. at 92.
[54] Enbridge Initial Br. at 74.
[55] Enbridge Initial Br. at 21.

means is that they do not receive all the oil they want *from Enbridge*. As discussed elsewhere in this brief and Sierra Club's Initial Brief, Enbridge's statement that "the Minnesota refiners have not been able to ship all of the crude oil they need via the Enbridge mainline system"[56] is simply unproven when Flint Hills only stated concern regarding its oil needs is that old Line 3 will be decommissioned and not replaced in the future. These sophisticated companies[57] nonetheless get all the oil they need, be it by other pipelines or different delivery methods that are already available to them. Even Enbridge admits this in its darkest moments.[58]

In fact, evidence of current conditions Enbridge and the Shippers rely upon shows the weakness of their apportionment argument. Enbridge notes that "demand *currently* exceeds the capacity of the Enbridge Mainline System"[59] and yet doesn't show how that leads to any current catastrophe among Minnesotan energy consumers. It doesn't show this because no such catastrophe exists—the scourge of apportionment has yet to make this industry term into a household name. Apportionment is ongoing and the sky still has not fallen. In fact, evidence that Enbridge recently added to the record shows that even "high" apportionment now exists but this is not currently causing any outages or consumer price shocks.

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[56] *Id.* at 91.
[57] *Id.* at 74 n.335 (describing the shippers as "highly commercially sophisticated parties").
[58] *Id.* at 73 ("Absent the pipeline capacity recovery sought in this proceeding, shippers may have to use alternatives to the Enbridge Mainline System."); *id.* at 90 (explaining that Minnesota refineries have "fewer alternative supply options than refineries elsewhere" and thereby conceding that they have several alternative supply options available); *id.* at 124 (admitting that over time "pipeline operators and their customers . . . adjust tolls and volume expectations").
[59] *Id.* at 22 (emphasis in original); *id.* at 53 (same emphasis).

Articles that Enbridge and the Shippers put into their Motion to Certify demonstrate the fragility of the apportionment argument they lean on so heavily. Their Motion claims that Enbridge recently "declared 21-percent heavy apportionment" in December 2017[60] but, if one looks at the extra-record article that Enbridge cites, the industry recognizes the market is currently reacting to a temporary shutdown of the Keystone pipeline after a recent oil spill. As the article states:

> TransCanada shut the pipeline November 16 after it detected a leak of 5,000 barrels at a site 3 miles southeast of Amherst, North Dakota. A company spokesman on Tuesday said while progress is being made at the site, it will be "some time" before a cause for the leak is determined and that the company does not yet have a timeframe for when operations will resume.[61]

Even at 21 percent apportionment, Enbridge did not argue in its Motion to Certify that there has been any impact to energy supplies. In fact, it seems to only be able to argue that this is negatively impacting the profitability of Canadian tar sands oil. Indeed, per the other extra-record article Enbridge cites: "'There is simply too much crude everywhere,' a Canadian trading source said Tuesday."[62] It is apparent from these sources—the best

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[60] Joint Motion to Certify of Enbridge Energy, Limited Partnership, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Laborers District Council of Minnesota and North Dakota, and Shippers for Secure, Reliable and Economical Petroleum Transportation at 7 (Dec. 28, 2018) (eDocket Nos. 201712-138480-03 (CN); 201712-138480-04 (R)) [hereinafter Joint Motion to Certify].

[61] Pat Harrington and Ashok Dutta, WCS Hardisty-Cushing crude spread widens to two-year high on Keystone shutdown, S&P Global Platts (Nov. 21, 2017), https://www.platts.com/latest-news/oil/houston/wcs-hardisty-cushing-crude-spread-widens-to-two-21617172 (cited in Joint Motion to Certify at 7 n.11).

[62] Pat Harrington, *Canadian Crude Prices Drop After Enbridge January Apportionment* S&P Global Platts (Dec. 19, 2017), https://www.platts.com/latest-news/oil/houston/canadian-crude-prices-drop-after-enbridge-january-21868375 (cited in Joint Motion to Certify at 7 n.12).

evidence Enbridge could bring about the increasing scourge of apportionment—that "apportionment" is another way of saying these companies made bad bets and are losing money,[63] which is something that businesses naturally do in highly competitive markets.[64] Moreover, the fact that Enbridge and the Shippers seek to address a short-term problem, such as the Keystone shutdown due to a large oil spill,[65] with a long-term solution, such as the Project, goes to show that apportionment simply won't be solved by any new pipeline—there will be more spills and shutdowns in these systems, and each time apportionment will rise as the non-broken pipes are filled even fuller with tar sands oil, this one project will not change the very nature of this industry.

2. Customer support alone it not a showing of customer "need"

Enbridge claims that "strong shipper support" is the basis on which need should be found.[66] It sums up the real crux of its argument in saying: "Perhaps the most straightforward demonstration of the need for the Project is this – despite Enbridge's Mainline Enhancement Projects over the past few years, the Enbridge Mainline System

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[63] *See id.* ("Western Canadian Select at Hardisty. . . futures contract (WTI CMA) minus $26.75/b Tuesday, down $2.25/b from Monday and $12.50/b since TransCanada temporarily shut the Keystone pipeline November 16. . . . The 17% apportionment for Lines 2 and 3 is 'really high,' one trading source said. 'That's beyond expectations.'")

[64] *See* Enbridge Initial Br. at 125 (discussing Enbridge's potential "competitive disadvantage . . . with other pipeline companies operating in Minnesota").

[65] Since all the parties to the Joint Motion to Certify entered evidence of the Keystone pipeline oil spill they have apparently conceded that fact and it is now appropriate under Minn. Stat. § 14.60 for the Administrative Law Judge to take notice of related facts in other parties' arguments based on that massive recent oil spill. *E.g.* Mille Lacs Band of Ojibwe Initial Br. at 24 (Jan. 23, 2018) (eDockets No. 20181-139245-01 (CN); 20181-139245-02 (R)) (discussing Keystone oil spill disaster on November 16, 2017) [hereinafter MBO Initial Br.].

[66] Enbridge Initial Br. at 22; *id.* at 34; *id.* at 60 (describing "the loud chorus of customer voices").

currently fails to meet shipper demand for crude oil . . ."[67] But unless it can link shipper demand or existing apportionment to actual shortfalls of energy or even refinery outages,[68] Enbridge has failed to show any legally cognizable need for this Project.

The Shippers' Initial Brief consistently shows a lack of need but a strong preference for having more money. Any assertion that this "need" is societal and not a corporate desire to save some money is given lie to by the Shippers' many statements. They sum up their position as such: "There is likely *no greater evidence* of the Project's need than shippers waiving the condition precedent despite a low-crude-oil prices environment and despite the prospect of possibly paying for costs incurred as a result of the Project being terminated."[69] Sierra Club could not agree more—Enbridge and the Shippers' case is so weak on evidence that the best possible argument they bring is relative oil cost estimates and contractual mumbo-jumbo between foreign corporations that has no bearing on Minnesotans or their need for energy.

This is not a one-off statement. The Shippers base their argument on conditions precedent and their willingness to pay throughout their brief.[70] These "sophisticated, and knowledgeable parties"[71] only do damage to the idea that Enbridge has shown any public need for its Project. As they hasten to remind the Commission: "Unlike rate-regulated

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[67] *Id.* at 29.
[68] Enbridge asserts that both Line 4 and Line 67 are able to keep Minnesota refiners from having outages, *id.* at 33, so it appears that they do not assert that apportionment is causing outages at this point.
[69] Shippers for Secure, Reliable and Economical Petroleum Transportation Initial Br. at 6 (Jan. 23, 2018) (eDocket No. 20181-139257-01 (CN)) (emphasis added).
[70] *Id.* at 1, 5, 6, 7.
[71] *Id.* at 5.

utilities the Commission oversees, the economic consequences of underutilization of the Mainline are a matter between Enbridge and its shippers and will not be directly borne by Minnesotans."[72]

The Shippers have many wants and desires.[73] The Shippers have preferences, and a long-term contract with Enbridge is currently their preferred way of doing business[74] because it is cheaper than some other alternatives.[75] However, their fidelity is only skin deep, they retain the right to go elsewhere for their oil transport should they find it profitable.[76] So while their corporate and contractual preferences are explicitly laid out in their briefing, they have made no showing that they intend to use Enbridge's service should a better offer come along.

Moreover, the Shippers' assertion that Minnesota consumers bear no risk from the proposed Project[77] shows beyond any doubt that Minnesotans do not *need* the Project. The Shippers' concept of risk is only pecuniary and does not regard any of the many well-documented and severe risks that Minnesotans will bear from a new tar sands pipeline. But even on the Shippers' money-only metric of the world, Friends of the Headwaters' Initial

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[72] *Id.* at 7.
[73] *Id.* at 8 (discussing their "desire" for "Mainline capacity").
[74] *Id.* at 13.
[75] *Id.* at 8 (discussing more expensive alternatives).
[76] *See id.* (noting that last year "shippers had to resort—if possible—to other methods of shipping crude, such as crude-by-rail").
[77] The utterly callous statement that "Shippers and Enbridge, not Minnesota citizens, bear the costs and risks," *id.* at 15, in light of the copious evidentiary record of Minnesota citizen's very real exposure to oil spill and climate change risks is more audacious than is appropriate to reply to in this brief. Sierra Club can only assume that Shippers' meaning is clouded by a money-only view of this dispute. This is further evidence that the Shippers' and Enbridge's case are based on a failure to understand the public dimensions of the *Public* Utilities Commission.

Brief showed that the costs of a poorly-thought-out pipeline will fall on Minnesotans at the gas pump and in other refined product purchases.[78] What the Shippers really prove is that Minnesotans do not own enough stock in their companies to bear the "risk" that they think is central to this inquiry—that risk is purely a private interest and has no bearing on whether or not Minnesotans would be in danger of not getting sufficient energy supplies.

It might cost shippers more money to use the Mainline in the future,[79] but it is just as likely that they will be buying cheaper American oil at a lower cost than Canadian tar sands due to the glut produced by current policies, leaving Enbridge's assets stranded. It is not the duty of the Commission to put the shipper's long-term profitability before the interests of Minnesotans. In fact, its duty is the opposite.

III. THERE ARE NO DEMONSTRATED SOCIOECONOMIC BENEFITS TO TAR SANDS FOR MINNESOTA

Under the CN rules, Enbridge bears the burden of showing that "the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate, considering . . . 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."[80] The purported economic benefits that Enbridge and its supporters bring up in their briefs has no relation to this project as opposed to any other large energy facility or infrastructure project employing skilled workers. By contrast, the

[78] *See* FOH Initial Br. at 21 ("regardless of who initially pays, the increased toll costs will increase the marginal cost of crude oil supply to Minnesota and to PADD II and much, if not all, of that increase will be passed on to consumers of refined products").
[79] Enbridge Initial Br. at 78.
[80] Minn. R. 7853.0130 (C)(2).

threats to indigenous communities, tribal members, and their culture and future is very real and linked directly to the Project. Enbridge's insistence on calling this new pipeline a "replacement" is meant to confuse these issues but, since it is not a replacement, the Commission can disregard this position and fully account for the impacts of this planned tar sands pipeline.

A. Construction and Investment Benefits Touted by Enbridge Are Independent of this Project and Will Occur with Any Like-Sized Energy Investment, Including Continued Use of Old Line 3

Minnesota only loses money as it consumes products made of oil. This is because Minnesota does not produce any oil,[81] so by lessening its dependence on this fuel Minnesota keeps money in its own economy and increases economic opportunity for its citizens.

DOC-DER was correct in its analysis of Enbridge's purported employment benefits to Minnesota:[82] they are illusory. The United Association makes a great deal of the fact that their expert's testimony went unrebutted[83] but neglects to admit that Enbridge's expert (whose analysis they rely upon to quantify the benefit)[84] rebutted these arguments by his many admissions on the stand during cross examination.[85] While the United Association has proven the benefit of using union labor for large energy infrastructure projects, including

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[81] Enbridge Initial Br. at 90.
[82] DOC-DER Initial Br. at 127–28.
[83] United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO Initial Br. at 2 (Jan. 23, 2018) (eDocket No. 20181-139255-01 (CN)) [hereinafter United Association Initial Br.].
[84] *Id.* at 5–7.
[85] DOC-DER Initial Br. at 128 ("Dr. Lichty agreed that a wind farm project or even a project to clean up an oil spill could positively impact the Minnesota economy under his economic impact analysis.") (citing Evid. Hrg. Tr. Vol. 1B (Nov. 1, 2017) at 165, 176 (Lichty)).

renewable energy development,[86] it has not made any showing of why those projects need to transport tar sands oil in order to have such employment benefits.

It is important to note that, just like the United Association,[87] Sierra Club is a founding member of the BlueGreen Alliance,[88] an organization that "unites labor unions and environmental groups to promote energy efficiency and sustainability in an environmentally-responsible way . . . [and] is a leader in its field and works towards repairing and modernizing our nation's infrastructure[.]"[89] As such, the Sierra Club acknowledges that organized labor is a necessary part of any energy infrastructure and clean energy future in America. It goes without saying that both the United Association and Laborer's experts brought irrefutable evidence that their members are the best workforce to take our energy systems into the next era. But they did not show that their members are somehow one-trick ponies—as highly skilled workers they are able to put up wind farms or remove an old pipeline just as well as they could install a pipe.[90]

Enbridge touts the "significant economic benefits to the Minnesota economy" of its proposed Project,[91] but its expert testified that any investment of this size would have similar benefits. Dr. Lichty explained on the stand, his analysis has nothing to do with tar sands economics.[92] He merely input a couple billion dollars of investment into a model and let it

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[86] Youth Climate Intervenors Initial Br. at 45 (Jan. 23, 2018) (eDocket Nos. 20181-139273-02 (CN); 20181-139271-02 (R)) [hereinafter YCI Initial Br.].
[87] *Id.*
[88] Ex. UA-1 at 8 (Barnett Direct).
[89] *Id.*
[90] Evid. Hrg. Tr. Vol. 5A (Nov. 8, 2017) at 62–64 (Whiteford).
[91] Enbridge Initial Br. at 75.
[92] *See* DOC-DER Initial Br. at 127–28.

show that that would lead to employment in the construction and other industries.[93] Any other similarly-sized investment would show a similarly-sized benefit in his view.

B. Approving a Permit for Enbridge Without Addressing Tribal Concerns Is Improper and Contrary To Law

As Fond du Lac lays out in its initial brief, the DOC-EERA's work is still unfinished on assessing the impacts on tribal communities.[94] Relying on the Army Corps of Engineers ("the Corps") to fix this mistake of planning and law is a huge error because it will never produce a complete review of the project's impacts to cultural properties: "the TCR Survey authorized by the Corps is limited to solely to water crossings along the APR, and even that won't be done until after the routing and need decisions are made."[95] Any study by the Corps will be too little too late, and the study done by the state thus far is woefully too little and never going to be completed if Enbridge gets its wish.

Moreover, these impacts are likely to be permanent and could (in the case of ongoing cultural practices around wild rice) destroy the future of tribal communities. These impacts are potentially huge and must be factored into the Commission's decision. The Tribes'

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[93] Enbridge also asserts that the maintenance of old Line 3 would also cost similar to replacement and would necessitate large amounts of integrity digs and ongoing active monitoring and repair of the old pipeline. Enbridge Initial Br. at 9 ("The cost of such an extensive dig and repair program is nearly equal to that of replacement."). Dr. Lichty's analysis would therefore similarly show a large economic benefit of the No-Action Alternative had he done any analysis to compare against the proposed Project. Enbridge claims it has committed to making this economic investment in keeping old Line 3 operating if it doesn't obtain its permits, and so the "benefits" it sees in the Project will be replaced dollar-for-dollar by Enbridge investment either way, under the company's stated plans.

[94] *See generally* Fond du Lac Band of Lake Superior Chippewa Initial Br. (Jan. 23, 2018) (eDocket Nos. 20181-139268-01 (CN); 20181-139264-01 (R)) [hereinafter FDL Initial Br.]; *e.g. id.* at 26.

[95] *Id.* at 26.

request for a full environmental review including an accounting of the likely impacts to their cultural resources is legally required but it is also exactingly reasonable, as Fond du Lac briefed: "The Tribes are asking for only what is necessary to protect their ancestors' remains, invaluable TCPs, and what is already required by state law."[96]

While touting its archeological review and coordination with "applicable agencies,"[97] Enbridge fails to acknowledge that it has not meaningfully coordinated or addressed the concerns of Minnesota's Tribes.[98] Archeological reviews, however thorough, do not protect living cultures and "Unanticipated Discovery Plans" for unassessed risks to cultural properties[99] is cold comfort to communities that have repeatedly had their sacred sites desecrated.[100] Once state agencies have turned over graves and destroyed burial grounds it is too late to fix the problem, the Commission should recognize it has a legal duty to prevent harm to these communities before it becomes an accomplice to further such affronts.

Leech Lake's commitment to never permit another Enbridge pipeline across its land is a stark reminder of the importance of getting this right.[101] Enbridge's long list of environmental harms that it associates with removing old Line 3[102] is a reminder that its Project can only be seen as less harmful to impacted communities if one agrees that

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[96] *Id.* at 30.
[97] Enbridge Initial Br. at 116.
[98] *Id.* at 117 (asserting that federal law doesn't require the company to respect tribal concerns or treaty rights, and that the company will not seek permits from tribal governments); *id.* at 160–61.
[99] *See id.* at 159.
[100] FDL Initial Br. at 39; YCI Initial Br. at 37 (quoting Ex. ML-1 (Kemper Direct)).
[101] Enbridge Initial Br. at 13–14 (recounting how Leech Lake has been clear from 2013 that it will not permit a replacement of Line 3 on its land, and the Band's recent commitment to "use all means at its disposal" to stop a new Line 3 in Leech Lake).
[102] *See id.* at 134–35.

Enbridge never has to clean up its messes, allowing it to leave derelict pipes in place forever.[103]

Minnesota has a long history of institutional racism and of ignoring and silencing native voices—it is well past time for this history to end. Recently, the Minnesota Pollution Control Agency ("MPCA"), the expert agency on Environmental Justice in the state,[104] had its proposed sulfate standard for wild rice waters rejected by the OAH.[105] The reason its rulemaking failed was that the agency's refusal to incorporate and address tribal concerns violated federal law and also, as a result, state law.[106] This contested case has different facts, but the lesson remains the same: "it is difficult to imagine anyone taking . . . a position [that review is complete] if any *other* aspect of historic-properties review had not been completed by the time the FEIS [final environmental impact statement] issued."[107] The Commission now has a chance to do the right thing: DOC-DER has made a first tentative step on behalf of the government by laying out tribal concerns and concluding "DOC DER is concerned about the potential impact to the natural and socioeconomic environments for wild rice that the proposed Project could present," and then finding the cumulative cultural and

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[103] Fond du Lac rejects abandonment on its lands as a solution to Enbridge's money issues. FDL Initial Br. at 22.
[104] *Id.* at 18.
[105] In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers, Minnesota Rules parts 7050.0130, 7050.0220, 7050.0224, 7050.0470, 7050.0471, 7053.0135, 7053.0205, and 7053.0406, OAH Docket No. 80-9003-34519, Report of the Administrative Law Judge at 68–69 (Jan. 9, 2018), *available at* https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-standards-wild-rice-rules-report_tcm19-323507.pdf.
[106] *See id.*
[107] FDL Initial Br. at 30.

environmental costs too high to pay.[108] The Commission must take this same positon and end its practice of treating tribal concerns and sites as less important than the concerns and sites of other citizens.[109] The Commission needs to make this right and abandon past practices that institutionalized bias against tribes and their members in the name of administrative convenience.

Any Enbridge pipeline will put Minnesota in danger by its very nature.[110] Enbridge seeks to use this threat to Minnesota's resources to make light of parties concerns about its preferred route.[111] But it is a far better illustration of why the Commission should not approve an unneeded Enbridge pipeline—the dangers to society remain no matter how carefully Enbridge might operate their new tar sands pipeline and no matter the route it would cut through.

C. The Proposed Project Is Not a Replacement of Old Line 3

Enbridge insists on calling this large new pipeline, in a new corridor, with the ability to carry new product[112] and nearly twice as much of it,[113] and a larger diameter[114] a "replacement."[115] The proposed Project is in every way a new pipeline and treating it as a

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[108] DOC-DER Initial Br. at 119, 134.
[109] *See* FDL Initial Br. at 31.
[110] As Enbridge argues, "Regardless of where a pipeline is built in Minnesota or neighboring states, its linear nature means that it will pass through or near resources that are important to the public and, specifically, to the people who live near those resources. The linear nature of the infrastructure would still require the Project to cross the Mississippi River." Enbridge Initial Br. at 93.
[111] *Id.*
[112] Enbridge Initial Br. at 55.
[113] *Id.* at 70.
[114] *Id.* at 61.
[115] Enbridge Initial Br. at 21 ("As an initial matter, it is important to remember that the Project is a *replacement* of an *existing pipeline*.").

replacement is inappropriate unless the applicant purports to remove and replace the old Line 3 pipeline. Enbridge's continued euphemistic assertion that this Project is a "replacement" is simply a marketing ploy and legal framing, but when the basic facts are acknowledged it is a demonstrably false narrative.

Leech Lake and Fond du Lac make clear in their Initial Briefs that old Line 3 will not be replaced on tribal lands.[116] Enbridge acknowledges that neither Leech Lake nor the Forest Service want another Enbridge pipeline on their land.[117] It also acknowledges that it "*permanently* de-rated existing Line 3's maximum operating pressure" in 2012[118] and, with it, old Line 3's potential utilization level, stating: "Line 3 cannot return to the capacity for which it was originally designed."[119] As such, old Line 3 cannot be replaced in its current location, and the capacity Enbridge wants from its Project is far above the permanently-set capacity of the pipeline it seeks to "replace."

Enbridge's insistence on its legal right to leave a derelict piece of large energy infrastructure in the ground indefinitely[120] proves that it is not planning to replace Line 3. It cannot be a replacement if there are two Line 3s at the end of this process. The company wants to make a new mess without cleaning up its old one and calls this a "replacement." The Commission must recognize that they are being asked to permit a new pipeline and that

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[116] *See*, *e.g.*, FDL Initial Br. at 22 ("in-trench replacement is not permitted along the portion of existing Line 3 that runs across the Reservation absent a voluntary agreement with the Band").
[117] Enbridge Initial Br. at 7.
[118] *Id.* at 8.
[119] *Id.*
[120] *See*, *e.g.*, *id.* at 137.

every impact of old Line 3 is attributable to a company whose normal practices are to externalize its pollution costs onto Minnesotan communities.

IV. ENBRIDGE IS NOT IN COMPLIANCE WITH MINNESOTA'S LAWS AND IS UNLIKELY TO ABIDE BY THEM WHILE BUILDING AND OPERATING THE PROJECT

Sierra Club strongly disagrees with DOC-DER's assumption that "the record in this proceeding provides no information that the final design, construction, or operation of the proposed Project would fail to comply with . . . relevant policies, rules, and regulations of other local, state, and federal governments"[121] as Enbridge is already in open violation of both MEPA and has raised enough evidence about its plans to operate old Line 3 to give the relevant agency cause to terminate its permits, as well as give private citizens an actionable right under MERA.

Minnesota Rules 7853.0130 put the burden on the applicant to show that:

> 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.

Enbridge has not been able to show this,[122] and its assurances that it will comply with the law belie the record before the Commission.

First, the record demonstrates that the MPCA has already sent Enbridge notices that it has violated permitting laws by beginning construction before environmental review is complete. Second, Enbridge's own testimony shows that it is likely in violation of MERA and could lose its permits to operate old Line 3 if the Minnesota Department of Natural

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[121] DOC-DER Initial Br. at 195.

[122] *See* Sierra Club Initial Br. at 40–48 (discussing the state and national policies the Project will violate and contravene).

Resources ("DNR") exercises its legal rights to protect the environment from the danger posed by continued operations. Enbridge's actions demonstrate it is a bad actor and will likely continue to flout Minnesota law when it chooses.

A. The Record Contains Documented Violations of MEPA and PCA Permitting Rules

Enbridge claims that: "With respect to construction, Enbridge will comply with all applicable permit requirements, its own mitigation plans, and any other environmental regulations."[123] The record demonstrates that the company is already in violation of environmental regulations with respect to construction.

Under MEPA, Minnesota Statute Section 116D.04, Subdivision 2b:

> If . . . an environmental impact statement is required for a governmental action under subdivision 2a, a project may not be started and a final governmental decision *may not be made to grant a permit, approve a project, or begin a project*, until:
>
> . . . .
>
> (3) the environmental impact statement has been determined adequate[124]

The FEIS in this proceeding has been deemed inadequate, so any permit or steps to begin the Project that Enbridge had conducted with government approval is in direct violation of this law.

In a public comment filed November 22, 2017, Mr. Willis Mattison revealed that the MPCA has already found Enbridge in violation of the environmental review rules regarding its construction activities. In an email he received from MPCA attorney Jean Coleman, the

[123] Enbridge Initial Br. at 116.
[124] Minn. Stat. § 116D.04, subd. 2b (2017) (emphasis added).

agency discussed the "Enbridge pipe storage yards" and Construction Stormwater permits obtained by the company.[125] In that email, Ms. Coleman stated:

> The MPCA received a complaint about the Enbridge sites approximately two years after permits were applied for and coverage letters were automatically issued. The MPCA immediately investigated the permits and inspected the sites. . . . The Agency determined environmental review was applicable to several of the pipeyard projects at the time the permit applications were submitted. . . . [W]e issued an enforcement letter on 3/3/2017, documenting the facts and restating the prohibition that the company not seek any additional permits for the project, prior to the completion of environmental review.[126]

Mr. Mattison attached this enforcement letter to his public comment.[127] While the PCA took no enforcement action to augment this letter, it evidently informed the company that it had failed to comply with basic permitting requirements in obtaining construction permits. This is a violation of MEPA's prohibition on obtaining permits and starting a project before an EIS is adequate. Enbridge received the notice more than eleven months ago but continues to claim it has not violated any laws in relation to construction. This is simply false and shows the company's lack of adherence to Minnesota law.

B. Enbridge Is Likely in Violation of MERA and the DNR Has the Right to Revoke Existing Licenses for Old Line 3

Far from "debunk[ing] the false premise that a crude oil pipeline cannot co-exist with northern Minnesota's natural resources,"[128] the case that Enbridge has brought shows that it

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[125] Comment by Willis Mattison (Nov. 22, 2017) (Attachment L) (eDockets No. 201711-137663-04 (CN)). Stormwater construction permits are a requirement of the Clean Water Act, administered by PCA through a delegation from the U.S. Environmental Protection Agency.

[126] *Id.*

[127] *See* Comment by Willis Mattison (Nov. 22, 2017) (Attachment K) (eDockets No. 201711-137663-02 (CN))

[128] Enbridge Initial Br. at 94.

should not be permitted to build any new pipelines due to its comfort with endangering Minnesota with its existing infrastructure. Enbridge has been explicit that old Line 3 "needs to be replaced" due to various types of cracking and other faults,[129] yet it plans to operate this pipeline as long as it needs to in order to keep its profits up regardless of the many documented dangers it stands to pose.

By making this case for using dangerous infrastructure indefinitely, Enbridge is in violation of the law and its existing permit obligations. Insisting on its "rights through public lands,"[130] the company makes oblique reference to the permits it first received for old Line 3 from the DNR. In this record, DNR has expressed numerous concerns about water crossing impacts and has suggested that it might not grant needed permits for the Project unless the Commission coordinates its route permit with the DNR.[131] Yet it is the existing permits under which old Line 3 operates that are already being violated.

These permits were issued in accordance with Minnesota Statutes Section 84.415, Subdivision 1, requirements for utility projects to cross state lands. This provision states, in relevant part:

> The commissioner of natural resources may, at public or private sale and for such price and upon such terms as are specified in the rules (except where prohibited by law) grant licenses permitting passage over, under, or across any part of any school, university, internal improvement, swamp, tax-forfeited or other land or public water under the control of the commissioner of natural resources, of telephone, telegraph, and electric power lines, cables or conduits, underground or otherwise, or mains or pipe lines for gas, liquids, or solids in suspension. Any such license shall be cancelable upon reasonable notice by the commissioner for substantial violation of its terms, or if at any time its

[129] *Id.* at 22.
[130] *Id.* at 137.
[131] *See generally* Comment by MDNR (Nov. 22, 2017) (eDocket No. 201711-137641-01).

> continuance will conflict with a public use of the land or water over or upon which it is granted, *or for any other cause.*[132]

This was also the law when the owner of old Line 3 obtained its licenses.[133] Thus, DNR retains the right to cancel old Line 3's permits for its ongoing dangers to public lands and Minnesota's resources. It is simply untrue that if the Commission denies Enbridge a permit then the company has the right to continue operating a dangerous pollution source that is rapidly degrading.

Moreover, this broad cancellation right retained by the DNR is relevant to private citizens' rights under MERA, which allows any person to bring a civil action against the state for a license that is inadequate to protect natural resources within the state from pollution, impairment, or destruction.[134] The remedy in such a suit would be for DNR to commence proceedings on old Line 3's existing licenses to redraft and strengthen them to adequately protect the environment.[135] Enbridge's copious record development in this case showing old Line 3's impacts to the environment and future impacts necessitated by its plans to continue operating the vintage pipeline give DNR cause to revoke its existing permits and, absent that, gives enough evidence under MERA for private parties to force DNR to revisit these permits and strengthen their environmental protections.

The high potential for old Line 3's continuing operation to lead to "pollution, impairment, or destruction" is unmistakable on this record. Enbridge's position in this

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[132] Minn. Stat. § 84.415, subd. 1 (2017).
[133] *See* 1951 Minn. Laws 463, 463–64 (H.F. No. 287, Subd. 1), *available from Minnesota Revisor at* https://www.revisor.mn.gov/laws/?id=356&year=1951&type=0.
[134] Minn. Stat. § 116B.10, Subd. 2 (2017).
[135] Minn. Stat. § 116B.10, Subd. 3 (2017).

contested case is that the "record before the Commission demonstrates . . . existing Line 3 has a unique combination of characteristics that has made the pipeline particularly susceptible to integrity threats."[136] Old Line 3 is likely the most dangerous pipeline Enbridge has and continues to operate, because it has "the largest external corrosion anomaly density on the Enbridge Mainline System."[137]

The company suggests that without a new pipeline it will continue to use old Line 3 and "thousands of 'integrity digs' will occur across northern Minnesota, including on the Leech Lake and Fond du Lac Reservations and Chippewa National Forest."[138] The company's current plan is for 7000 such digs over the next 15 years,[139] and estimates that they will directly affect 270,000 acres.[140] The digs will imperil large numbers of sensitive ecological areas, water and fisheries resources, and wild rice lakes.[141] "Each integrity dig is a disruption to landowners and the environment."[142] Old Line 3's existing problems "will make safely maintaining the existing Line 3 an extraordinary challenge in the coming years."[143]

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[136] Enbridge Initial Br. at 5.
[137] *Id.* at 8; *see also id.* at 148 (quoting consent decree language noting that old Line 3 is made from pipe substantially similar to the pipe that led to the Marshall spill).
[138] *Id.* at 5–6.
[139] *Id.* at 9.
[140] *Id.* at 108.
[141] *Id.*
[142] *Id.* at 71; *id.* at 79 (describing the many environmental harms of integrity digs).
[143] *Id.* at 8.

Old Line 3 has a high risk of spilling oil if it remains in operation.[144] Also, the cost of the dig and repair plan is "nearly equal to that of replacement."[145] Starting this year Enbridge is under additional inspection and repair requirements pursuant to its consent decree with the federal government based on its past history of catastrophic oil spills.[146] Even if Enbridge does deactivate the old Line 3 pipeline, removing it is "potentially not possible,"[147] leaving Minnesotans to deal with this discarded source of pollution indefinitely.[148]

Enbridge makes a great deal of its "goal" to have "zero safety incidents."[149] This can only be stated as a goal because of the company's well-documented history of catastrophic spills[150] and its inability to assure safety. The Commission is apparently supposed to take comfort in the fact that Enbridge wants to "learn[] from prior incidents,"[151] and we know that there have been many of those in the past,[152] but still plans to operate what it describes as a dangerous pipeline until it gets what it wants—permission to build a second, new pipeline. If operating a pipeline is done "much in the same way as airplanes are scheduled for

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144 *Id.* at 80; *id.* at 81 (calling old Line 3 a "50-year-old pipeline with known integrity risks"); *id.* at 101 ("Simply put, 'older pipelines are more likely to have spills. . . .' This is not surprising") (internal citation omitted); *id.* at 109.
145 *Id.* at 9.
146 *Id.* at 11 (discussing how its Consent Decree imposed additional requirements after December 31, 2017).
147 *Id.* at 134.
148 FDL Initial Br. at 22 ("The Band continues to argue that [abandonment] is not a reasonable option and will result in permanent impacts over a huge territory, regardless of the alleged permissibility of such plan under certain state or federal laws.").
149 Enbridge Initial Br. at 94; *id.* at 99 (listing "Safety Culture Improvement" as a plan for the Control Center in the future).
150 *See id.* at 123 (discussing the Marshall Michigan oil spill from Line 6B in the Kalamazoo River as "the largest of inland oil releases").
151 *Id.* at 95.
152 *Id.* (referring to its replacement of the burst 6B pipeline in Michigan euphemistically as an "investment" in its facilities).

arrivals and departures into our airports,"[153] the Commission must take pause at the fact that Enbridge wants to keep flying a 1960s airplane and fixing it mid-flight, even though the Applicant has shown throughout the record that this is neither responsible nor safe. It seems that Enbridge's Control Center Staff still need considerable "Safety Culture Improvement"[154] in following their second golden rule of "operating in a safe manner at all times"[155] because, at present, they plan to keep operating a dangerous pipeline indefinitely.

The totality of the evidence the Applicant put in the record about the environmental dangers of old Line 3 and its plans to use it anyway make an argument for why DNR could soon revoke its licenses and thereby mitigate the impacts associated with further use of that line.[156] While the company has used the threat of continued operation to try to obtain permits from the Commission, it is not for the Commission to balk while another agency holds the legal tools necessary to solve the Catch-22 presented by Enbridge's position. Enbridge is correct in asserting that no party supports its continued operation of old Line 3,[157] but that is at least partly because the company has shown itself to be a bad actor with no regard for the safety or interests of Minnesotans. If it did, it would not be making the extortionist threat of prolonged operation of old Line 3 over the Commission in order to speed along its permits.

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[153] *Id.* at 99.
[154] *Id.*
[155] *Id.* at 100.
[156] DNR is not a party to this case and cannot speak directly on its plans to shut down old Line 3, but the fact that it has these legal rights nonetheless shows that the Commission has been presented with a false choice between two disastrous pipelines.
[157] Enbridge Initial Br. at 77.

Since the company's testimony demonstrates that it is already prepared to run its existing infrastructure unsafely, at great risk to Minnesota, it should not receive permission from the government to establish yet another pipeline corridor that it can later operate with the same level of recklessness.

CONCLUSION

Any piece of transportation infrastructure has the potential to get clogged through overuse. Every day Interstate 94 experiences slowdowns due to surges in traffic, in a sense going into "apportionment." Some drivers find this very frustrating. Some will undoubtedly be late to work. Some will be annoyed. Enbridge would solve this problem by doubling the capacity of the highway, up to sixteen lanes to "replace" the eight lanes that are there now. But this cannot solve the problem. Anyone who has spent time in Los Angeles traffic can tell you that building twice as much highway just leads to worse congestion. The additional infrastructure induces demand and the jams get worse. Building your way out of this problem only digs a deeper hole. The real solution to this overloaded infrastructure is to get on the bus (which are increasingly electric) and avoid the problem altogether.

In its arguments, Enbridge repeatedly harps on how "sophisticated" its customers are, and the Shippers self-apply this compliment as well. Sophisticated corporate actors in highly-competitive markets who are able to source their needs without any help do not *need* a boost from the Commission, especially one that comes at a steep cost to Minnesota's residents. Nobody doubts that these sophisticates would like such a boost, every corporation does, but they have failed in every way to show they need it or that the Commission should recognize such desires as sufficient "need" under the law.

The record before the Commission in this case is big and messy. As one party described it in 2016, when Enbridge had rescinded its Sandpiper applications but pushed the process ahead nonetheless, the Commission's process has become a "sprawling hodgepodge"[158]—and, at this stage in the proceeding, this description is even more apt than it was back then. This is owing partly to the Commission's failure to properly scope the EIS process and comply with MEPA, but it is also due to Enbridge's obfuscation about basic facts of its case leading to a confused record. Among its illegitimate positons in this case are its right to continue operating old Line 3 and the inclusion of FEIS alternatives that have no bearing on reality such as the absurdist truck alternative.

What this massive record does *not* contain is any showing by Enbridge that there is a legitimate need for the energy transported by the Project in Minnesota or surrounding states. Enbridge has failed to show a need for *energy*. Enbridge has failed to show demand for energy-related refined products. Enbridge has failed to link its Project to anything other than the potential for profitable international exports of crude oil. Enbridge has failed to show basic facts, even with more time and resources to make its case than every other participant in these proceedings. This leads to only one conclusion: if Enbridge's many employees and outside consultants, years of preparation, and money spent on lawyers and expertise could not make a credible showing of need, there really is no possible need for any new tar sands pipelines in Minnesota's energy future.

[158] Motion to Extend or Reopen the Environmental Impact Statement Scoping Period at 11 (Sept. 26, 2016) (eDocket Nos. 20169-125169-02 (CN); 20169-125170-01 (R)).

This is a triumph of energy planning forty-four years in the making, the Commission should deny Enbridge's application and congratulate itself for finally closing a chapter in our state's energy history, consistent with lessons learned in 1973. The law requires denial of Enbridge's application, and Minnesota will be the better for it economically, culturally, and environmentally.