

**STATE OF MINNESOTA  
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

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

MPUC Docket Nos. PL-9/CN-14-916  
PL-9/PPL-15-137

OAH Docket Nos. 65-2500-32764 and  
62-2500-33377;  
Sub-Docket No. 8-2500-34602

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**MILLE LACS BAND OF OJIBWE  
INITIAL BRIEF**

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**I. INTRODUCTION**

From well before the filing of its applications for a Certificate of Need and Route Permit, Enbridge Energy, Limited Partnership (“Enbridge” or the “Applicant”) proceeded full-steam with its plans to construct a new pipeline to replace the existing Line 3 across northern Minnesota. In the fall of 2014, even before the Public Utilities Commission (“PUC” or the “Commission”) determined that the route permit application was substantially complete, Enbridge began securing the easements necessary to construct the pipeline along its proposed route and, by November 2017, had secured easements from 94% of the private property owners.<sup>1</sup> Enbridge already is constructing the replacement pipeline across Canada and in Wisconsin, and has stockpiled much of the pipe necessary to construct the new Line 3 along its proposed route in Minnesota.<sup>2</sup> Given this significant investment, which Enbridge has repeatedly acknowledged is at its own risk, it is unsurprising that the company has refused to waiver from its plan to replace Line 3 along its preferred route. Enbridge maintains this position despite the repeated objections from the Minnesota Chippewa Tribes, including the Mille Lacs Band of Ojibwe (“MLBO” or the “Band”),

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<sup>1</sup> Order Finding Application Substantially Complete and Varying Timelines (Aug. 12, 2015) (eDocket No. 20158-113179-01 (R)); Evid. Hrg. Tr. Vol. 3A (Nov. 3, 2017) at 106-107 (McKay).

<sup>2</sup> Evid. Hrg. Tr. Vol. 2A (Nov. 2, 2017) at 35:22-36:24; 116:17-117:12 (Simonson).

the environmental concerns raised by the Minnesota Pollution Control Agency (“MPCA”) and the Minnesota Department of Natural Resources (“MDNR”), and the numerous other concerns raised by the public and the other parties who intervened in these dockets.<sup>3</sup>

The law is clear. Although the capital sunk into the proposed Line 3 Replacement Project may cloud the company’s judgment, it is irrelevant for the PUC’s consideration of the Certificate of Need and Route Permit applications. Ultimately, the law requires the Commission to deny Enbridge’s applications for a Certificate of Need and prohibits issuance of a Route Permit for construction of the Line 3 Replacement Project (the “Project”) along Enbridge’s preferred route.

## II. ARGUMENT<sup>4</sup>

### A. ENBRIDGE IS NOT ENTITLED TO A CERTIFICATE OF NEED FOR THE LINE 3 REPLACEMENT PROJECT.

No large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the Public Utilities Commission.<sup>5</sup> The burden falls on the applicant to justify its need for the project.<sup>6</sup> Minnesota Rule 7853.0130 outlines the criteria for determining whether a Certificate of Need may be granted. It states:

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

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<sup>3</sup> DNR Comment Letter (Sep. 30, 2015) (eDocket No. 20159-114451-01 (R)); DNR Comment Letter (Nov. 22, 2017) (eDocket Nos. 201711-137641-01 (CN); 201711-137640-01 (R)); MPCA Comment Letter (Sept. 30, 2015) (eDocket Nos. 20159-114431-01 (CN); 20159-114431-02 (R)); MPCA Comment Letter (Nov. 22, 2017) (eDocket Nos. 201711-137629-01 (CN); 201711-137629-02 (R)).

<sup>4</sup> Pursuant to the January 11, 2018 Fourth Prehearing Order (eDocket Nos. 20181-138799-01 (CN); 20181-138800-01 (R)), MLBO will submit proposed findings of fact on February 16, 2018. Accordingly, and in recognition of the Office’s familiarity with the facts, MLBO does not include a statement of facts in this brief and instead includes references to the record throughout its legal argument.

<sup>5</sup> Minn. Stat. § 216B.243, Subd. 2.

<sup>6</sup> *Id.*

- 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 . . .
- 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 . . .
- C. the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certification . . . *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.<sup>7</sup>

The use of “and” in the Rule means that the Commission must find that all four criteria weigh in favor of the applicant before it can grant a Certificate of Need.<sup>8</sup> If the Commission concludes that any of the criteria are not met, it must deny a certificate of need for the Project. Here, the Applicant has not demonstrated a need for the Project because (1) denying the application would not adversely affect the “adequacy, reliability or efficiency” of energy supply; (2) more reasonable and prudent alternatives to the project exist; and (3) the negative consequences to society of granting the certificate of need outweigh any consequences of denying the certification. Accordingly, the Commission must find that the Applicant has not met its burden to demonstrate a need for the Project, and deny the Certificate of Need application.

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<sup>7</sup> Minn. R. 7853.0130 (emphasis added).

<sup>8</sup> See *State v. Nelson*, 842 N.W.2d 433, 441 (Minn. 2014) (“[T]he conjunctive ‘and’ . . . requires concurrence of both grounds . . . and had only one ground been intended to be required, the disjunctive ‘or’ would have been used.”) (quoting *Farnam v. Linden Hills Congregational Church*, 149 N.W.2d 689, 696 (Minn. 1967)).

**1. There Is Insufficient Evidence in the Record to Show that the Probable Result of Denial Would Adversely Affect the Future Adequacy, Reliability, or Efficiency of Energy Supply.**

The first factor of the Certificate of Need analysis requires the Commission to find that “the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of supply to the applicant, the applicant’s customers, or to the people of Minnesota and neighboring states.”<sup>9</sup> The sub-factors that the Commission must consider are:

- (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;
- (3) The effects of the applicant’s promotion 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.<sup>10</sup>

The Band’s brief will focus on the first factor, the accuracy of the Applicant’s forecast, and the third factor, the ability of current and planned facilities to meet future demand.

**a. *The Applicant Has Not Presented an Accurate Forecast to Justify the Need for the Project.***

The first sub-factor of Minn. R. 7853.0130(A) requires the Commission to consider the “accuracy of the applicant’s forecast of demand for the type of energy that would be supplied by the proposed facility.” The statutory language on which the rule is based similarly states that the Commission “shall evaluate . . . the accuracy of the long-range energy demand forecasts on which

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<sup>9</sup> Minn. R. 7853.0130(A).

<sup>10</sup> Minn. R. 7853.0130(A)(1)-(5).

the necessity for the facility is based.”<sup>11</sup> The Commission cannot simply take the Applicant’s forecast of demand at face value; rather, it must evaluate the data, information, methodology, assumptions, and factors that underlie the forecast to determine its reliability and accuracy.<sup>12</sup>

The Report and Testimony of the Department of Commerce’s witness, Dr. Marie Fagan, identify fundamental flaws with the Applicant’s forecasted demand for the product that will be supplied by the Project. First, and most critically, the Applicant’s forecast relies on a very narrow set of projections for crude oil supply and demand. As Dr. Fagan states:

Neither of the two reports considers more than one potential future for oil supply, demand or infrastructure. Both reports rely on a single outlook for annual crude oil supply and no specific outlook at all for refined product demand. Neither report allows for more than one potential future for infrastructure development. . . . Neither report recognizes the potential for a dynamic relationship over time between transportation and supply.<sup>13</sup>

When evaluating the need for a long-lived infrastructure project such as a pipeline, the common practice is to use a range of outcomes and potential future market conditions against which to test the decision to build.<sup>14</sup> This is because while it is difficult to guarantee the accuracy of any forecast, a forecast that depends on a narrow range of views and ignores important trends or drivers cannot be considered reliable or “accurate.”<sup>15</sup> Here, the Applicant’s experts did just that.

First, with respect to supply, the Applicant’s forecast relies on a single outlook, the Canadian Association of Petroleum Producer (“CAPP”) 2016 outlook, to forecast supply. Dr. Fagan identifies this as a “major limitation” of the Applicant’s forecast, because “using a single

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<sup>11</sup> Minn. Stat. § 216B.243, subd. 3(1).

<sup>12</sup> See Minn. Stat. § 216B.243, subd. 3(1); Minn. R. Ch. 7853.0520.

<sup>13</sup> Ex. DER-4, Attach. 1 at 5 (Fagan Direct).

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

outlook for annual oil production can mask the potential for a wide variety of future outcomes.”<sup>16</sup>

As Dr. Fagan’s Report demonstrates, other forecasts, such as those created by the National Energy Board (“NEB”) in Canada and the Energy Information Administration (“EIA”) in the United States, offer much different production scenarios based on a range of potential oil prices.<sup>17</sup>

Moreover, the use of a single model is inconsistent with previous Certificate of Need proceedings related to crude oil pipelines. For example, in the Line 67 (Alberta Clipper) Upgrade Order, Enbridge relied on forecasts from four entities: the EIA, NEB, CAPP, and the Energy Resources Conservation Board.<sup>18</sup> Similarly, when the Commission granted a certificate of need to the Minnesota Pipeline Company, it considered forecasts from the applicant, refineries, the United States Department of Energy, CAPP and NEB.<sup>19</sup> Enbridge’s original application for a certificate of need for the Alberta Clipper also relied on several different forecasts from the NEB, CAPP, Enbridge, the EIA, and the Minnesota Department of Commerce.<sup>20</sup> These proceedings highlight the fact that the use of just one supply forecast to justify need is inconsistent with precedent and undermines the validity and reliability of the Applicant’s forecast.

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<sup>16</sup> *Id.* at 23

<sup>17</sup> *See id.* at 24.

<sup>18</sup> *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 67 (Alberta Clipper) Station Upgrade Project – Phase 2 – in Marshall, Clearwater, Itasca, Kittson, Red Lake, Cass, and St. Louis Counties*, MPUC Docket No. PL-9/CN-13-153, Order Granting Certificate of Need at 14-15 (Nov. 7, 2014).

<sup>19</sup> *See id.* (citing *In the Matter of the Application of Minnesota Pipeline Company for a Certificate of Need for a Large Petroleum Pipeline*, MPUC Docket No. PL-5/CN-06-2, Findings of Fact, Conclusions and Recommendation at ¶¶ 61-62, 65-69 (Nov. 17, 2006), adopted in Order Granting Certificate of Need at 10 (Apr. 13, 2007)).

<sup>20</sup> *See id.* (citing *In the Matter of the Application of Enbridge Energy, Limited Partnership, and Enbridge Pipelines (Southern Lights) LLC for a Certificate of Need for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project*, Docket No. PL-9/CN-07-465, Summary of Testimony at the Public Hearings, Findings of Fact, Conclusions and Recommendations at ¶¶ 111-122 (July 17, 2008), adopted in Order Granting Certificate of Need at 14 (Dec. 29, 2008)).

The Applicant's demand analysis is equally if not more flawed than its supply analysis. First, the Applicant wholly fails to consider demand for refined products by end-users and essentially assumes that demand for refined products will remain constant through the entire forecast period.<sup>21</sup> The Applicant argues that because the Certificate of Need requirements focus on demand for the type of product delivered by the Project (crude oil), the demand for the end-product is irrelevant.<sup>22</sup> This simplistic view ignores the very real impact that changes in the demand for refined products have on demand for the input. Dr. Fagan explained the causal chain as follows:

Demand for refined products drives demand for crude oil, and is therefore a driver of the price of crude oil. Weak demand for refined products can lead to low prices for refined products; low prices of refined products can lead to lower refiner margins, which impacts the viability of some refineries, which in turn can lead to lower refinery demand for crude oil.<sup>23</sup>

As Dr. Fagan discusses, market trends and programs that accelerate the adoption of electric vehicles have the potential to impact demand for crude and refined oil. Dr. Fagan specifically evaluated the impact of electric vehicle adoption on gasoline consumption based on EIA projections. She concluded that if gasoline consumption in the Minnesota district behaves as the EIA projects, Minnesota's demand for gasoline could fall as low as 100 thousand barrels per day by 2030.<sup>24</sup> This trend in the market is likely to reduce the demand for refined products in Minnesota and neighboring states. Accordingly, the failure of the Applicant to consider the impact of any change in demand for refined products severely impacts the "accuracy" of its forecast.

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<sup>21</sup> Ex. DER-4, Attach. at 25-26 (Fagan Direct).

<sup>22</sup> Ex. EN-37 at 5 (Earnest Rebuttal).

<sup>23</sup> Ex. DER-7, Attach. at 5 (Fagan Surrebuttal).

<sup>24</sup> Ex. DER-4, Attach. at 28-29 (Fagan Direct).

Even assuming, as the Applicant does, that demand for refined product has no bearing on the Commission’s analysis, the Applicant’s analysis does not demonstrate that demand for crude oil justifies the need for the Project. The Applicant’s primary justification for the Project is that the Enbridge Mainline System has been in “apportionment” for many years, meaning that nominations from shippers exceed the capacity of the system, and are thus reduced on a pro rata basis.<sup>25</sup>

While apportionment means that shippers may not be receiving the full volume they request, that does not automatically translate to a lack of an adequate and reliable energy supply. Indeed, as both Dr. Fagan and Kate O’Connell testified, the refineries in the Minnesota district (which includes Minnesota, North Dakota, South Dakota, and Wisconsin) as a group have been operating at high levels of utilization, which indicates that they are not short of physical supplies of crude oil and that they have little room to increase total crude runs.<sup>26</sup> In addition, in her Second Surrebuttal, Dr. Fagan examined available data to determine whether there is evidence that apportionment actually limits the supply of heavy crude to Minnesota district refiners. Dr. Fagan concluded that while there was some correlation on an annual basis between high levels of apportionment and lower feeds of heavy crude to refineries, a monthly analysis revealed no correlation.<sup>27</sup> This indicates that apportionment is not impacting refineries’ production levels.<sup>28</sup>

Notably, neither the Applicant nor its customers present any credible evidence that apportionment has an actual impact on refineries’ ability to obtain sufficient supplies. As Dr.

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<sup>25</sup> See Ex. EN-19 at 10 (Glanzer Direct).

<sup>26</sup> See Ex. DER-4, Attach. at 14 (Fagan Direct); Ex. DER-1 at 75 (O’Connell Direct).

<sup>27</sup> Ex. DER-9, Attach. at 9-10 (Fagan Supplemental Surrebuttal).

<sup>28</sup> While Mr. Earnest questions the analysis of Dr. Fagan, he presents no alternative analysis that shows apportionment has an actual impact on crude oil supplies. *See generally* Ex. EN-94 (Earnest Supplemental Surrebuttal)

Fagan testified, none of these parties have presented any specific data, such as the barrel-per-day impact of apportionment on shipments, nor have they presented any quantification of the cost of apportionment to the Applicant, shippers, or refineries.<sup>29</sup> Indeed, when asked to explain “the most credible evidence that apportionment has a negative impact on Minnesota refiners,” Enbridge’s expert could only say that “Minnesota refiners . . . assert that apportionment is a problem, and that restoring the capacity of Enbridge Line 3 would be beneficial to them.”<sup>30</sup> These self-serving conclusions, unsupported by any actual data, are wholly insufficient for the Commission to find that there is need for the Project.

For these reasons, the Commission should find that the Applicant has not presented an “accurate” forecast of demand for the product to be supplied by the Project. To be clear, it is not the Commission’s, nor the Department’s, nor the Intervenors’ responsibility to present a reliable and accurate demand forecast for the product that will be supplied by the Project; rather, the Commission must evaluate the accuracy of the *Applicant’s* forecasted demand based upon the data, information, methodology, assumptions, and factors that underlie the forecast.<sup>31</sup> Here, the Applicant has presented a forecast of supply and demand based on a single outlook that overlooks the probability of decreasing demand for refined products in the future. Moreover, Applicant’s fundamental reason for the Project, to reduce apportionment, is unsupported by data showing that apportionment has an actual effect on the adequacy or reliability of supplies. Under these circumstances, the Commission simply cannot conclude that the Applicant’s forecast is “accurate.”

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<sup>29</sup> Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 84-85 (Fagan).

<sup>30</sup> See Ex. EN-94 at 1-2 (Earnest Supplemental Surrebuttal).

<sup>31</sup> See Minn. Stat. § 216B.243, subd. 3(1); Minn. R. Ch. 7853.0520.

**b. The Commission Must Independently Consider Alternatives to Meeting Future Demand.**

In evaluating the effect of denying the Certificate of Need on the adequacy, reliability, and efficiency of energy supplies, the Commission must consider “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.”<sup>32</sup> To be clear, this alternatives analysis is different than the analysis required under Minn. R. 7853.0130(B), which requires the Commission to consider whether a more reasonable and prudent alternative has been demonstrated by a preponderance of the evidence on the record by parties other than the applicant. Under sub-factor A(4), the Commission must make an *independent* evaluation of the potential for improvements or upgrades to existing facilities to meet future demand; the onus here is not on the intervening parties to present these alternatives to the Commission. This means that the Commission must consider alternatives such as: unused capacity on existing Enbridge crude oil pipelines that transport crude from Canada to the United States; Enbridge’s ability to more efficiently use its existing crude oil pipelines; Enbridge’s ability to “upgrade” its existing crude oil pipelines; and Enbridge’s intentions related to “planned facilities” that could transport crude from Canada to the United States.

In particular, the Commission should consider Kate O’Connell’s testimony, which indicates that despite the capacity limitations on existing Line 3, Enbridge’s mainline system has been delivering increasing amounts of supplies to Clearbrook and Superior.<sup>33</sup> O’Connell concludes that the reason for this is that the Commission has already granted two certificates of need to Enbridge to expand the capacity of its Mainline system.<sup>34</sup> She further concludes that the

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<sup>32</sup> Minn. R. 7853.0130(A)(4).

<sup>33</sup> Ex. DER-1 at 26-27 (O’Connell Direct).

<sup>34</sup> *Id.* at 27.

added capacity of 350,000 bpd on Line 67 is equal to the increase in overall capacity that would be provided by this Project, and thus, “it appears that the increases in the capacity of Enbridge’s Line 67, for which the Commission granted Enbridge certificates of need, are already meeting [the Applicant’s] claimed need.”<sup>35</sup>

In addition, the witness for Honor the Earth, Lorne Stockman, presents significant evidence that Enbridge has additional plans for upgrading or increasing the capacity of its existing pipelines, such that the added capacity of the Project would be wholly redundant.<sup>36</sup> The Commission must consider these less costly and less intrusive means of meeting the alleged need for the project.

Because the Applicant has not shown that denying the Certificate of Need would adversely impact the adequacy, reliability, and efficiency of energy supply, the Commission must deny the Certificate of Need.

## **2. The Evidence in the Record Demonstrates that More Reasonable and Prudent Alternatives to the Project Exist.**

The second Certificate of Need factor requires the commission to evaluate whether “a more reasonable and prudent alternative to the proposed facility” has been “demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant.”<sup>37</sup> The Certificate of Need proceedings in this case considered several alternatives including: the no-action alternative, rail, trucking, and expansion of existing Enbridge pipelines.<sup>38</sup> In addition, System Alternative-04 (“SA-04”) was approved as a Certificate of Need Alternative in the Commission’s Scoping Order.<sup>39</sup> Finally, the Department requested information from Enbridge

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<sup>35</sup> *Id.* at 28.

<sup>36</sup> See Ex. HTE-2 at 32-36 (Stockman Direct).

<sup>37</sup> Minn. R. 7853.0130(B).

<sup>38</sup> Ex. DER-1 at 31-32 (O’Connell Direct).

<sup>39</sup> See *id.*

regarding the impact that the building of the Keystone XL Pipeline, the Energy East Pipeline, and the Spectra Pipeline would have on the need for the Project.<sup>40</sup>

The first alternative that the Commission must consider, is of course, the no-action alternative, which simply means that the proposed Project would not be built. For all of the reasons discussed above regarding the flaws in the Applicant's forecast of supply and demand, and the fact that refineries in the Minnesota district have been operating at high levels and appear to have no room to increase their productions, the no-action alternative is a reasonable and prudent alternative to building the Project. Moreover, the no-action alternative avoids the serious adverse consequences to the natural and socioeconomic environments (discussed at length below) that would result from the construction and operation of the Project.

As O'Connell testifies, this should end the consideration of alternatives,<sup>41</sup> however, if the Commission determines that there is a need for additional crude oil capacity, other alternatives to the Project are supported by evidence in the record and should be considered by the Commission. First, the Commission must consider whether other planned pipelines, such as the Keystone XL, the Energy East Pipeline, and the Spectra Pipeline, can meet the "need" for the Project by reducing the amount of crude that needs to flow through the Mainline, and thus reduce or eliminate the alleged "problem" of apportionment. O'Connell concludes that each of these pipelines would "increase export capacity from Western Canada," and could thereby free up capacity on the Enbridge Mainline.<sup>42</sup> The Commission must, therefore, consider these as alternatives to the Project.

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<sup>40</sup> *Id.* at 33.

<sup>41</sup> *Id.* at 35.

<sup>42</sup> *Id.* at 57, 59, 63.

Finally, the Commission must consider SA-04, a conceptual alternative for pipeline service directly to the Chicago market.<sup>43</sup> Although SA-04 does not cross through Clearbrook and Superior, because it serves the Chicago market, it still meets the requirements of the Certificate of Need analysis, by meeting the need in neighboring states.<sup>44</sup> In addition, as with the other alternative pipelines, such as Keystone XL, Spectra, and Energy East, because SA-04 would provide an alternative route for crude out of Western Canada, it would also serve to free up capacity on the Enbridge Mainline and reduce the issue of apportionment. Therefore, the Commission should also consider SA-04 as a reasonable and prudent alternative to the proposed Project.

### **3. The Negative Consequences to Society that Would Result from Building the Project Dramatically Outweigh Any Claimed Benefits.**

The third Certificate of Need criteria requires the Commission to determine whether:

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.<sup>45</sup>

The most important factor in this analysis, from the Band's perspective, is the overwhelming negative effect that the Project would have on the natural and socioeconomic

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<sup>43</sup> *Id.* at 42.

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

<sup>45</sup> Minn. R. 7853.0130(C).

environments. While the Final Environmental Impact Statement (“FEIS”) remains woefully incomplete, particularly in terms of its analysis of the impact of the Project on traditional cultural resources,<sup>46</sup> it demonstrates the disproportionate and adverse impacts that the Project would have on tribal communities from an environmental, socio-economic, and environmental justice perspective.

From the outset of these proceedings, the tribal communities, as well as the DNR, MPCA, and numerous other Intervenors have expressed very serious concerns regarding the impacts of a new pipeline, and in particular, the impacts of a new pipeline corridor in this particular region of the state. As discussed further below, the risks associated with the Project as proposed by the Applicant are particularly great because the majority of the pipeline would be built in a “greenfield,” meaning that the proposed route does not track an existing pipeline corridor.<sup>47</sup> Moreover, the route the Applicant has chosen passes through some of the most pristine and interconnected waters of the state. The Project introduces the risks associated with a pipeline to hundreds of acres of largely untouched land. These risks include the potential for an accidental oil release, which would be particularly detrimental to the high-quality water resources in this region as well as damage to forests, wild rice, and fish and wildlife habitats during construction and maintenance of the pipeline.<sup>48</sup> Moreover, establishing a new pipeline corridor raises the potential that other new or rerouted pipelines will be routed through the same corridor, magnifying the risk to these resources.

From a tribal perspective, the Applicant’s preferred route is in close proximity to irreplaceable natural and cultural resources, including regions where the Anishinaabe have

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<sup>46</sup> See *infra* § II.B.2.

<sup>47</sup> Ex. DER-1 at 81-82 (O’Connell Direct).

<sup>48</sup> *Id.* at 80.

gathered wild rice, harvested plants, and retained ceremonial sites and burial sites for hundreds of years. Although the survey of cultural resources is not yet complete, to the Anishinaabe people, cultural resources and natural resources are the same thing, and any effect on natural resources affects cultural resources as well.<sup>49</sup> Thus, “cultural” resources include not only ceremonial areas, burial sites, and archeological sites, but also water, wild rice, medicinal plants, and wildlife.<sup>50</sup> The FEIS lays out in detail the impacts the pipeline will have on these resources, including disturbance or destruction of sensitive wild rice lakes, degradation of traditional fishing areas, segmentation and disturbance of traditional hunting grounds, destruction of culturally significant plants and other natural resources, and potential demolition of archeological or burial sites, among many others.<sup>51</sup> As Terry Kemper, the assistant Tribal Historic Preservation Officer for the Mille Lacs Band of Ojibwe stated:

As a community, we strive to keep this connection to the land and to our other natural resources. Traditional natural resources are not alienable. There is no substitute for things like wild rice and other medicinal plants. There is no substitute for the earth and soil or for clean water. The Anishinaabe are taught to look at how we will impact future generations and to think about the consequences that our actions will have seven generations from now. As part of this, we teach our children to preserve our natural resources. These resources are a part of our culture. ... Any major changes to the land and environment will not just affect us, but our children, our grandchildren, and their grandchildren.<sup>52</sup>

In addition to the impact on natural and cultural resources, the Project will have a disproportionate and adverse impact on environmental justice communities, including Native American communities in the project area. Any new pipeline construction would exacerbate the

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<sup>49</sup> Ex. ML-1 at 3 (Kemper Direct).

<sup>50</sup> *Id.* at 1.

<sup>51</sup> Ex. EERA-29 at 9-27 to 9-37 (FEIS).

<sup>52</sup> Ex. ML-1 at 2 (Kemper Direct).

negative mental, spiritual, and physical health effects already disproportionately suffered by Native American communities.<sup>53</sup> Terry Kemper testified, “[w]hen we are cut off from our resources and culture, there is a large impact on mental and physical health. Our people have some of the highest rates of homelessness, depression, suicide, alcoholism, and other illnesses. This is tied to the loss of our traditions and resources. People who have a connection to nature tend to have better mental health. … When you take away that connection, people suffer.”<sup>54</sup>

The impact that the Project will have on cultural and natural resources cannot be overstated. The overwhelming evidence in the record that the Project will have a significant negative effect on the natural and socioeconomic environments must weigh strongly against granting the Certificate of Need for the Project.

**B. THE PUBLIC UTILITIES COMMISSION CANNOT GRANT A ROUTE PERMIT FOR ENBRIDGE’S PREFERRED ROUTE.**

Minnesota Rule 7852.1900 identifies the criteria the Commission must consider when determining the route for a pipeline.<sup>55</sup> In determining the route, the Commission is required to consider “the characteristics, the potential impacts, and methods to minimize or mitigate the potential impacts of all proposed routes so that it may select a route that *minimizes human and environmental impact.*”<sup>56</sup> Specifically, the Commission must consider the following factors when making a route permit decision:

- A. human settlement, existence and density of populated areas, existing and planned future land use, and management plans;
- B. the natural environment, public and designated lands, including but not limited to natural areas, wildlife habitat, water, and recreational lands;

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<sup>53</sup> Ex. EERA-29 at 9-38 (FEIS).

<sup>54</sup> Ex. ML-1 at 6-7 (Kemper Direct).

<sup>55</sup> Minn. R. 7852.1900, subp. 1.

<sup>56</sup> Minn. R. 7852.1900, subp. 2 (emphasis added).

- C. lands of historical, archeological, and cultural significance;
- D. economies within the route, including agricultural, commercial or industrial, forestry, recreational, and mining operations;
- E. pipeline cost and accessibility;
- F. use of existing rights-of-way and right-of-way sharing or paralleling;
- G. natural resources and features;
- H. the extent to which human or environmental effects are subject to mitigation by regulatory control and by application of the permit conditions contained in part 7852.3400 for pipeline right-of-way preparation, construction, cleanup, and restoration practices;
- I. cumulative potential effects of related or anticipated future pipeline construction; and
- J. the relevant applicable policies, rules, and regulations of other state and federal agencies, and local government land use laws including ordinances adopted under Minnesota Statutes, section 299J.05, relating to the location, design, construction, or operation of the proposed pipeline and associated facilities.<sup>57</sup>

The requirement, in the Commission's rules, that its must select a route for a pipeline that "minimizes human and environmental impact" is buttressed by the substantive requirement of the Minnesota Environmental Policy Act ("MEPA").

MEPA prohibits any:

state action significantly affecting the quality of the environment ... where such action ... is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources in the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction.<sup>58</sup>

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<sup>57</sup> Minn. R. 7852.1900, subp. 3.

<sup>58</sup> Minn. Stat. § 116D.04, subd. 6.

The concern for “natural resources in the state” is not limited to the flora and fauna but rather includes “all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historic resources.”<sup>59</sup> Importantly, MEPA makes clear that “[e]conomic considerations alone shall not justify such conduct.”<sup>60</sup>

There is no dispute that the issuance of a route permit for construction of the Project is a “state action significantly affecting the quality of the environment.” This is the reason an environmental impact statement was required. Similarly, while there may be uncertainty regarding the magnitude of the impacts, there is no reasonable dispute that the construction and operation of the Project “is likely to cause pollution, impairment, or destruction of the air water, land or other natural resources in the state.” The relevant consideration for purposes of MEPA and the Commission’s decision of whether to grant a permit to authorize construction along the Applicant’s Preferred Route (“APR”) is whether there exists a feasible and prudent alternative which would result in fewer adverse environmental impacts. Because the answer is “yes,” the Commission is prohibited by law for granting a route permit for the APR.

### **1. RA-03AM is a feasible and prudent alternative.**

Route Alternative RA-03AM would follow the APR from the North Dakota border to Clearbrook, MN and from Carlton, MN to Superior, WI but follows a different alignment between Clearbrook and Carlton.<sup>61</sup> The route was originally proposed by the MPCA in connection with the Sandpiper Pipeline Project in part to avoid the Mississippi River Headwaters area as well as Minnesota’s Lakes region.<sup>62</sup> DNR subsequently proposed additional modifications to the route

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<sup>59</sup> Minn. Stat. § 116D.04, subd. 1a (a); §116B.02, subd. 4.

<sup>60</sup> Minn. Stat. § 116D.04, subd. 6.

<sup>61</sup> Ex. EERA-29 at 4-20 (FEIS).

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

alternative in 2015 in connection with the Line 3 proceedings.<sup>63</sup> Both DNR and MPCA submitted early comments expressing support for RA-03AM.<sup>64</sup> DNR noted, for example, that the APR “crosses a large numbers of lakes, streams and wetlands within the northern lakes and forested ecoregions” and that these “are generally the highest quality recreational water resources in the state.”<sup>65</sup> DNR also noted that a spill in the vicinity of the Sandy River (crossed by the APR) would be particularly damaging in light of the presence of a nearby “large and significant natural wild rice area” and a walleye spawning area.<sup>66</sup>

RA-03AM parallels an existing pipeline right of way from Clearbrook to Park Rapids and would “focus[] pipeline construction and operations impacts in an area already affected by a crude oil pipeline.”<sup>67</sup> The route travels generally south and east toward Hinckley and then follows either the existing 8-inch Megellan Refined Products pipeline or a Northern Natural Gas Pipeline until it would rejoin the APR and then continue to Superior, WI.<sup>68</sup> RA-03AM has a total length of approximately 395 miles in Minnesota, approximately 55 miles longer than the APR.<sup>69</sup> As the FEIS notes, RA-03AM reroutes around fens, fish hatcheries, and, to some extent, communities and avoids specific Wildlife Management Areas.<sup>70</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> DNR Comment Letter (Sep. 30, 2015) (eDocket No. 20159-114451-01 (R)); MPCA Comment Letter (Sept. 30, 2015) (eDocket Nos. 20159-114431-01 (CN); 20159-114431-02 (R)).

<sup>65</sup> DNR Comment Letter at 15 (Sep. 30, 2015) (eDocket No. 20159-114451-01 (R)).

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

<sup>67</sup> Ex. EERA-29 at 4-20 (FEIS).

<sup>68</sup> Ex. EERA-29 at 4-21 (FEIS).

<sup>69</sup> Ex. EERA-29 at 4-21 (FEIS); Evid. Hrg. Tr. Vol. 2A (Nov. 2, 2017) at 47 (Simonson).

<sup>70</sup> Ex. EERA-29 at 4-20 (FEIS).

RA-03AM is feasible. It could be constructed, operated, and meet the Applicant's stated need to transport oil to Superior, WI.<sup>71</sup> Accordingly, the relevant question is whether it would result in fewer adverse environmental effects than the APR.

**2. The FEIS erroneously suggests the potential impacts of the APR and RA03-AM are equivalent.**

The FEIS identifies and evaluates the potential impacts related to the construction and operation of the Project and several route and system alternatives. This analysis suffers from a fundamental flaw in that it fails to distinguish between the magnitude of the impacts that would result from constructing and operating the Project adjacent to an existing pipeline versus a "greenfield" site where no pipelines currently exist. This failure dramatically overstates the comparative impacts of utilizing an existing pipeline corridor as compared to a new greenfield location. This is best demonstrated in the summary analysis in the FEIS of the resources of concern which could be exposed to the risks associated with an unanticipated release of crude oil, that is, a spill.

The Executive Summary of the FEIS identifies the percentage of each route alternative that would share or parallel existing rights-of-way.<sup>72</sup> Figure ES-9 shows the percentage of existing utility corridors that each route would follow with a breakdown by the type of corridor (e.g., transmission lines, pipelines, none, etc.) and indicates that less than 30 percent of the APR parallels existing pipeline corridors; the lowest percentage of any alternative besides RA-06.<sup>73</sup>

Although it initially notes the differences in the extent to which the various routes following existing pipeline corridors, the analysis in the text of the Executive Summary and

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<sup>71</sup> Evid. Hrg, Tr, Vol. 2A (Nov. 2, 2017) at 80 (Simonson).

<sup>72</sup> Ex. EERA-29 at ES-23-24 (FEIS).

<sup>73</sup> Ex. EERA-29 at ES-24 (FEIS).

throughout the FEIS disregards the distinctions between types of corridors and essentially assumes all corridor sharing is equal. That is, the FEIS implicitly suggests that the impacts of constructing and operating a petroleum pipeline adjacent to an existing pipeline would be the same as constructing and operating a pipeline adjacent to an electric transmission line or a highway. This failure to account for the fact that the APR utilizes non-pipeline corridors understates the extent to which it would introduce the risks associated with a petroleum pipeline spill to new areas of the state.

This issue was explored during the cross-examination of Enbridge's Director of Line 3 Execution, Barry Simonson.<sup>74</sup> Mr. Simonson was asked questions regarding two hypothetical streams that would be crossed by a new petroleum pipeline; one stream is crossed by an existing petroleum pipeline and the other is crossed by a high voltage transmission line.<sup>75</sup> The construction and operation of either pipeline would create the risk of an accidental release.<sup>76</sup> The new petroleum pipeline would result in an incremental increase in the risk of a potential spill for the stream that already is crossed by a pipeline, whereas it would introduce, for the first time, spill-related risks to the stream crossed by a high voltage transmission line.<sup>77</sup> Focusing on the benefits of corridor sharing while ignoring the *type* of corridor that is shared masks the fact that the APR would expose numerous resources to the risks associated with an accidental release for the first time.

This problem is highlighted in Table ES-4 of the FEIS which provides a summary of the resources of concern which could be exposed to risk from an unanticipated released of crude oil:<sup>78</sup>

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<sup>74</sup> Evid. Hrg. Tr. Vol. 2A (Nov. 2, 2017) at 20; 69-73 (Simonson).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Ex. EERA-29 at ES-28 (FEIS).

Resources of Concern	Applicant's Preferred Route	Route Alternative RA-03AM	Route Alternative RA-06	Route Alternative RA-07	Route Alternative RA-08
HCA populated area	4,814.1	12,829.2	3,230.0	20,806.6	17,363.7
HCA unusually sensitive ecological area	10,978.1	7,752.3	12,674.4	26,854.4	27,566.9
HCA drinking water source	501.1	2,399.1	718.0	2,942.0	2,998.3
Drinking water AOI	83,833.7	153,971.9	16,196.0	64,785.5	63,726.0
Cultural resources AOI	0.0	13.5	11,425.6	44,046.8	45,766.0
Biological AOI	94,053.5	65,287.5	58,822.3	88,764.0	92,613.0
Commodity production AOI	50,199.6	5,648.2	88,363.0	72,008.1	80,853.5
Recreation/tourism AOI	3,704.1	4,100.9	1,838.6	1,443.0	1,924.3
<b>TOTAL</b>	<b>248,084.2</b>	<b>252,002.6</b>	<b>193,267.9</b>	<b>321,650.4</b>	<b>332,811.7</b>

Department of Commerce witness Eric White confirmed that Table ES-4 assumes an equal baseline for each alternative, without regard for existing conditions.<sup>79</sup> However, he acknowledged that information regarding existing conditions is an important consideration when evaluating the differences between the alternatives.<sup>80</sup> Indeed, the pre-filed testimony by the Department's witness Kate O'Connell distinguished between the concerns that arise with respect to the construction and operation of a new pipeline adjacent to an existing petroleum pipeline corridor or through an area where no pipeline exists currently.<sup>81</sup> Nonetheless, the analysis in the FEIS as summarized in Table ES-4 assumes an equal baseline and suggests that the APR and RA-03AM are roughly equivalent with respect to the resources which would be exposed to the risks of an accidental release.

The Commission recognized the importance of the distinction between sharing a corridor with another pipeline as opposed to some other utility and concluded that the FEIS was inadequate

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<sup>79</sup> Evid. Hrg. Tr. Vol. 11B (Nov. 17 2017) at 75 (White).

<sup>80</sup> *Id.* at 76.

<sup>81</sup> Ex. DER-1 at 81-82 (O'Connell Direct).

because “[t]he EIS needs to clearly identify the extent to which resources impacts of route alternatives in the existing Line 3 corridor are or are not additive—i.e., the extent to which the route alternative would introduce new or additional impacts beyond the impacts of the existing pipelines in that corridor.”<sup>82</sup> The revised analysis likely will present a very different comparison of the APR and RA-03AM with the Applicant’s preferred route and RA-06 exposing the greatest number of resources to the risks of an accidental release *for the first time.*<sup>83</sup>

Resources of Concern	Applicant’s Preferred Route	Route Alternative RA-03AM	Route Alternative RA-06	Route Alternative RA-07	Route Alternative RA-08
HCA populated area	2,191.70	1,676.91	1,600.67	0.00	0.00
HCA unusually sensitive ecological area	4,997.98	1,013.31	6,280.98	0.00	0.00
HCA drinking water source	228.13	313.59	355.81	0.00	0.00
Drinking Water AOI	38,166.78	20,125.77	8,026.15	0.00	0.00
Cultural Resources AOI	0.00	1.76	5,662.12	0.00	0.00
Biological AOI	42,819.53	8,533.77	29,150.21	0.00	0.00
Commodity Production AOI	22,854.26	738.28	43,789.52	0.00	0.00
Recreation/tourism AOI	1,686.36	536.03	911.14	0.00	0.00
<b>TOTAL</b>	<b>112,944.74</b>	<b>32,939.43</b>	<b>95,776.61</b>	<b>0.00</b>	<b>0.00</b>

The risks associated with routing the Project through a corridor where no pipeline exists would be in addition to the risks posed by the state’s other pipelines. The existing Line 3 pipeline runs along the Enbridge mainline corridor with five other pipelines.<sup>84</sup> Even if Line 3 is replaced

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<sup>82</sup> Order Finding Environmental Impact Statement Inadequate at 3 (December 14, 2017) (eDockets Nos. 201712-138168-02 (CN); 201712-138618-01 (R)).

<sup>83</sup> The figures reflected in the table were derived by multiplying the areas reflected in Table ES-4 by the percentage of each route that does not follow an existing pipeline corridor based on the information set forth in Table 6.7-1 of the FEIS. This is an estimate intended to illustrate the different conclusions that could be drawn by comparing the alternatives based on the total areas potentially exposed to the risk of an unanticipated release (as is done in the FEIS) as opposed to the areas where the construction of a pipeline would introduce such risk to locations where it does not presently exist. More accurate information will be available after the Department of Commerce has completed work on the revised EIS.

<sup>84</sup> Ex. EERA-29 at ES-1.

and the existing line is decommissioned, these other pipelines will continue to operate and the resources along the main line corridor will continue to be exposed to the risks of an accidental release. Constructing the Project along a new route simply exposes additional resources to the risks of a spill.

Finally, although Enbridge asserts that the risks of a spill from a new pipeline are minimal, such spills are not unprecedented. On November 16, 2017, the nine-year old Keystone Pipeline ruptured near Amherst, SD spilling what was initially estimated at 210,000 gallons of crude oil.<sup>85</sup> The leak has been attributed to construction damage caused by weights used to hold the pipeline in place where changing water levels could cause the pipeline to float.<sup>86</sup> Enbridge intends to use this same technique for construction of Line 3.

The risks associated with constructing and operating the Project along the APR and RA-03AM are not equivalent. The APR unnecessarily introduces the very real risks of a spill to areas where such a risk does not currently exist whereas RA-03AM minimizes these risks by following existing pipeline corridors to a much greater extent. RA-03AM is feasible, prudent, and would result in fewer adverse environmental effects than the APR and, as a result, the Commission is barred from granting a route permit to allow construction of the Project along Enbridge's proposed route.

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<sup>85</sup> See NPR, *Keystone Spill Likely Caused by Construction Damage* (Nov. 29, 2017) <https://www.npr.org/sections/thetwo-way/2017/11/29/567267101/keystone-spill-likely-caused-by-construction-damage-investigators-say>.

<sup>86</sup> *Id.*

**3. Crucial information regarding cultural and historic resources is missing and the Commission cannot make a reasoned choice among the various alternatives.**

The Commission is required to consider multiple factors such as the anticipated impacts on natural resources and features, when deciding whether to grant a route permit for a petroleum pipeline.<sup>87</sup> Natural resources include “historic resources” and, in this context, include traditional cultural resources of the Minnesota Chippewa tribes.<sup>88</sup> The FEIS and multiple witnesses, including Enbridge’s own expert, stress the unique importance of cultural resources for the Minnesota Chippewa Tribes and describe the significant adverse consequences of losing these resources. However, the analysis of the potential impacts of the Project on these resources is so deficient as to preclude a Commission decision on the route permit.

MLBO’s cultural resources include ceremonial areas, burial sites, archeological sites, water, wild rice, medicinal plants, wildlife, and the Band’s language and customs.<sup>89</sup> The Anishinaabe have gathered wild rice and harvested plants in places like the Big Sandy Lake and Rice Lake watersheds for hundreds of years.<sup>90</sup> The rich and varied cultural resources form a bond for a community that is rooted in its history.<sup>91</sup> Past pipeline projects have left indelible scars on the land and traditional medicinal plants no longer grow in the area.<sup>92</sup> These projects, invariably, lead to the disruption of burial sites and archeological sites.<sup>93</sup> The destruction of cultural resources

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<sup>87</sup> Minn. R. 7852.1900, subp. 3;

<sup>88</sup> See the definition of “natural resources” in the Minnesota Environmental Rights Act, Minn. Stat. § 116B.02, subd. 4, which is incorporated into MEPA, Minn. Stat. § 116D.04, subd. 1a (a).

<sup>89</sup> Ex. ML-1 at 1 (Kemper Direct).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.*

has a long-lasting impact on the MLBO and its members as was discussed in a study commissioned by the Band in 2015 which cited a Minnesota Department of Health report which found:

Causes of health inequities in American Indian communities are directly linked to determined and deliberate efforts of American federal, state and local governments to uproot the American Indian people from their land, eradicate their languages and destroy their way of life. First among these is the uprooting of the people from their traditional lands, a major factor that scientists recognize creates psychological and health impacts for generations. Displacement brought about a loss of traditional ways of making a living, of providing food for the table, and of being in relationship with one another.”<sup>94</sup>

The significance of this historic trauma was noted in the FEIS which recognized that tribes’ cultural identity suffers when they are deprived “of access to, and management of, natural and cultural resources” and that “[t]his has led to historical and current trauma that some tribal members may experience.”<sup>95</sup>

The FEIS does remarkable work in recognizing the unique nature of the Anishinaabe’s cultural resources and their very significant connection to the natural environment.<sup>96</sup> However, the FEIS does not attempt to identify the specific cultural resources that would be impacted by construction and operation of the Project and notes “[t]o date, no specific studies of TCPs have been completed within the [region of interest], and as such, no specific locations and/or details are known at this time.”<sup>97</sup> Even Enbridge’s own expert recognizes that this is not sufficient. During

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<sup>94</sup> Ex. ML-1, Ex. A at 15-16 (Kemper Direct) (*citing* Minnesota, Department of Health, Office of the Commissioner, *Advancing Health Equity in Minnesota: Report to the Legislature* (2014) 1, 73).

<sup>95</sup> Ex. EERA-29 at 9-19 (FEIS); *see also* Ex. EERA-29 at 9-37 (FEIS) (“Tribal communities also explained that the proposed Project would have an additional cumulative impact on historical and current trauma as the affected tribes continue to face the loss of tribal resources and ongoing degradation to the natural environment, because of the impacts of the Applicant’s preferred route on tribal resources.”).

<sup>96</sup> *See, generally,* Ex. EERA-29 at Chapter 9 (FEIS).

<sup>97</sup> Ex. EERA-29 at 6-635 (FEIS).

the evidentiary hearing Dr. Bergman testified that a desktop survey of cultural resources should be conducted for all alternate routes for a pipeline to allow a comparison of the alternatives.<sup>98</sup>

Nonetheless, the evaluation of the potential impacts to cultural resources is being deferred to the permitting process administered by the Army Corps of Engineers.<sup>99</sup> Although this process is underway, it will not be completed until after the route has been determined and will survey only the Applicant's preferred route.<sup>100</sup> Accordingly, there is no basis in the record for the Commission to compare the relative impacts of the APR and other alternatives.<sup>101</sup>

This lack of information is compounded by the fact the comparative data in the FEIS is misleading. The problem with failing to make even a preliminary evaluation of the potential impacts on cultural resources is highlighted in Table ES-4's comparison of the resources exposed to the risk of a petroleum spill. Both the FEIS and Dr. Bergman agree that wild rice is an important cultural resource for the MLBO and the other Minnesota Chippewa Tribes and should be classified as a traditional cultural property.<sup>102</sup> The APR will pass through a wild rice water.<sup>103</sup> Yet, incredibly, the FEIS states, in the same paragraph that indicates that wild rice is a traditional cultural property, that no specific locations of traditional cultural properties are known at this time

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<sup>98</sup> Evid. Hrg. Tr. Vol. 3A (Nov. 3, 2017) at 26-27 (Bergman).

<sup>99</sup> Evid. Hrg. Tr. Vol. 10B (Nov. 16, 2017) at 61 (Eberth).

<sup>100</sup> *Id.*

<sup>101</sup> The Commission order finding the FEIS inadequate provides that “[t]he EIS needs to clarify that the traditional cultural properties survey must be completed before the start of any construction pursuant to any permit granted in this proceeding.” Order Finding Environmental Impact Statement Inadequate at 4 (December 14, 2017) (eDockets Nos. 201712-138168-02 (CN); 201712-138618-01 (R)). The Fond du Lac Band, Mille Lacs Band, and other Minnesota Chippewa Tribes petitioned the Commission to reconsider this order and require a full traditional cultural property survey along the APR and the route alternatives before the environmental impact statement is deemed adequate. Joint Tribal Petition for Reconsideration (January 2, 2018) (eDocket Nos. 20181-138561-01 (CN); 20181-138561-02 (R)).

<sup>102</sup> Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 135-137 (Bergman); Ex. EERA-29 at 6-635 (FEIS).

<sup>103</sup> Evid. Hrg. Tr. Vol. 5B (Nov. 8, 2017) at 8-9 (Lee).

and Table ES-4 of the FEIS states that “0.0” “Cultural Resources AOI [Areas of Interest] would be impacted by a pipeline following the APR.”<sup>104</sup>

Given the lack of information regarding the comparative impacts on cultural resources, the Commission cannot satisfy its obligation to consider the potential impacts on natural resources—including historic and cultural resources—and, therefore, is precluded from issuing a route permit for the Project until such a cultural resources analysis is completed.

### **III. CONCLUSION**

The Commission must deny the application for a Certificate of Need for the Line 3 Replacement Project because the Applicant has not shown that the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply, and there are more reasonable and prudent alternatives to the facility that are supported by the evidence in the record. Most importantly, the negative consequences to society of granting the Certificate of Need far outweigh any benefit of the Project. Accordingly, the Commission should find that the Applicant has not met its burden to demonstrate a need for the Project, and deny the application.

To be clear, every pipeline route would pose significant and material risks to the environment and to natural and cultural resources that are central to the Mille Lacs Band of Ojibwe’s identity and way of life, which cannot be mitigated or alleviated. However, if the Commission determines that there is a need for the Project, it cannot issue a Route Permit for the Applicant’s Preferred Route because RA-03AM is feasible and prudent and would result in fewer negative environmental impacts due to the fact that it largely parallels existing pipeline corridors. Moreover, the Commission’s failure to consider adequately the potential impacts on cultural and historic resources precludes issuance of a route permit for the Line 3 Replacement Project.

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<sup>104</sup> Ex. EERA-29 at ES-28; 6-635 (FEIS).

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Respectfully submitted,

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