

Mr. Douglas Kramer  
Deputy Director  
Bureau of Energy Resources  
United States Department of State  
2201 C Street, NW  
Washington, DC 20520

**Re: Application of High Prairie Pipeline, LLC Requesting Amendment of Presidential Permits Issued to Enbridge Energy, Limited Partnership**

Dear Mr. Kramer:

High Prairie Pipeline, LLC (“High Prairie”) hereby submits this application for amendment to the Presidential Permits issued by the U.S. Department of State (“State Department”) to Enbridge Energy, Limited Partnership (“Enbridge Energy”)<sup>1</sup> to construct, connect, operate and maintain pipeline facilities at the international border of the United States and Canada at Neche, North Dakota, for the transportation of crude oil and other hydrocarbons between the United States and Canada, in accordance with Article 1 thereof<sup>2</sup> and Executive Order 13337.<sup>3</sup>

High Prairie emphasizes that it is not seeking rescission or suspension of Enbridge Energy’s Presidential Permits. High Prairie merely seeks amendments to the Presidential Permits to ensure consistency with what the State Department was led to believe it was getting from Enbridge Energy in the first place—specifically, pipelines that would bring oil in from Canada and would provide equal and non-discriminatory access to all market participants, without regard to affiliation or the nation of origin of an oil shipment.

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<sup>1</sup> These Presidential Permits include the 1991 Border Crossing Permit for Enbridge Energy’s 18-, 26-, and 34-inch diameter liquid hydrocarbon pipelines; the 1994 Border Crossing Permit for its 20-inch diameter liquid hydrocarbon pipeline; the 1998 Border Crossing Permit for its 36-inch liquid hydrocarbon pipeline; the 2009 Border Crossing Permit for its 20-inch LSr Project; and the 2009 Border Crossing Permit for its 36-inch diameter Alberta Clipper Project.

<sup>2</sup> Article 1 of the Presidential Permits provides in pertinent part that “this permit may be terminated at the will of the Secretary of State of the United States or the Secretary’s delegate or may be amended by the Secretary of State of the United States or the Secretary’s delegate at will or upon proper application therefore . . .”

<sup>3</sup> 69 Fed. Reg. 25299 (2004).

High Prairie submits that because of changed circumstances, these Presidential Permits as originally written no longer serve the national interest. Enbridge Energy has begun to conduct its pipeline operations in a way that unduly discriminates against production of U.S. crude oil and in favor of production from the Canadian tar sands. High Prairie respectfully requests that the State Department exercise its authority under Sections 1(g) and 4 of Executive Order 13337 to amend Enbridge Energy's Presidential Permits to include terms and conditions that ensure Enbridge Energy complies with its common carrier obligations, including granting interconnects in a non-discriminatory manner, to ensure a level playing field for oil produced in the U.S. and promote the national interest.

High Prairie is submitting this application to the State Department because Enbridge Energy has taken the position that neither the Federal Energy Regulatory Commission ("FERC"), nor the U.S. Forest Service has the authority to remedy the situation.<sup>4</sup> As discussed more fully herein, Enbridge Energy is conducting its pipeline operations in a manner that is both detrimental to the national interest and contrary to what the State Department was led to believe with respect to how Enbridge Energy's pipelines would be operated.

The pipelines authorized by the subject Presidential Permits are part of what Enbridge Energy refers to as its Lakehead System or U.S. Mainline, which extends 1,900 miles from Neche, North Dakota to Chicago, Illinois and has the capacity to carry 2.5 million barrels of oil per day.<sup>5</sup> Until recently, Enbridge Energy operated this Lakehead System on a common carrier basis, affording equal and non-discriminatory access to anyone seeking to use the system, regardless of whether the oil to be shipped was produced in the U.S. or Canada. In fact, the State

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<sup>4</sup> FERC has general regulatory authority over interstate oil pipelines under the Interstate Commerce Act. 49 U.S.C. app. §1, et seq. The Forest Service has authority over certain aspects of oil pipeline operations under the Mineral Leasing Act, when the pipeline crosses National Forest lands. 30 U.S.C. § 185(r).

<sup>5</sup> See <http://www.enbridge.com/DeliveringEnergy/OurPipelines/LiquidsPipelines.aspx>

Department was led to believe that Enbridge Energy's U.S. Mainline would be operated in this equitable fashion.<sup>6</sup> Nevertheless, Enbridge Energy is now taking the position that it can unabashedly discriminate against U.S. production by simply refusing to grant interconnections with the U.S. Mainline, thus ensuring that exclusive access to Enbridge Energy's 1,900-mile U.S. Mainline is enjoyed by Canadian production and certain other preferred shippers that utilize pipeline facilities owned and operated by affiliates of Enbridge Energy.

The national interest requires that Enbridge Energy grant U.S. production non-discriminatory access to its U.S. Mainline and that it provide a level playing field to all production in the U.S. and Canada. Enbridge Energy's refusal to do so is in disregard of the U.S. national interest and the obligations that come with being a common carrier. As discussed more fully herein, Enbridge Energy has violated and continues to violate its common carrier obligations by unduly discriminating against High Prairie and the U.S. oil production it would serve by denying its shippers access to Enbridge Energy's U.S. Mainline. Specifically, Enbridge Energy is refusing to grant High Prairie an interconnection at the Clearbrook, Minnesota market hub—the desired interconnection point of both High Prairie and the shippers of the U.S. oil production it would carry—except under terms that are so commercially unreasonable (and contrary to the national interest) that no unaffiliated pipeline would ever accept them.

Meanwhile, Enbridge Energy is readily accepting increasing volumes of Canadian tar sands

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<sup>6</sup> See, e.g., Application of Enbridge Energy Limited Partnership for a Presidential Permit, at 15 (June 4, 2010) (holding itself out as “an interstate common carrier of crude petroleum and natural gas liquids”); *Id.* at 2 (stating that the facilities Enbridge Energy was asking the State Department to approve were necessary to “avoid apportionment on the Enbridge Mainline system due to the forecasted growth in Alberta oil sands production”); *Id.* at 13 (same); U.S. Department of State, Final Environmental Impact Statement, Southern Lights 20-Inch Crude Line Project, “LSr Pipeline Project,” at xxv (stating that it was impossible to assess the air quality impacts of Enbridge Energy's project because “Enbridge will operate the pipeline as a common carrier facility . . .”); *Id.* at 31 (stating that “Since Enbridge operates as a common carrier, the crude oil delivered via the LSr pipeline would not involve long-term commitments to specific refineries”); *Id.* at 3-78 (“The pipeline would be operated for common carrier traffic and therefore Enbridge has no way of ascertaining the ultimate destination of the transported crude”). When demand for line space exceeds the capacity of its pipeline, a common carrier is required to apportion or prorate its capacity in an equitable manner among the shippers requesting service, rather than simply refuse to provide service to new shippers.

production at Clearbrook from its own upstream lines. In fact, Enbridge Energy has confirmed that it has enough currently unutilized capacity on its pipelines moving downstream from Clearbrook to accept 150,000 barrels per day from High Prairie at Clearbrook, the entire capacity of the pipeline High Prairie is proposing to build. Yet, Enbridge Energy is withholding that transportation capacity from the market, so that it can be used for increased Canadian tar sands volumes that are not expected to emerge until at least 2016.

## I.

### **Background**

High Prairie is a wholly-owned subsidiary of Saddle Butte Pipeline, LLC (“Saddle Butte”), a developer of gathering, processing and transportation infrastructure for crude oil and natural gas producers throughout the Mid-Continent and Rocky Mountain regions. High Prairie intends to construct a 450-mile pipeline system capable of transporting 150,000 barrels of crude oil per day from the prolific Bakken formation in North Dakota to Clearbrook, Minnesota, including the development of significant operational storage facilities at or near Clearbrook. The High Prairie pipeline project (“HP Pipeline”) would provide access for production-rich areas in McKenzie, Dunn, Mountrail, and other counties in North Dakota to transport crude oil supply in an otherwise capacity-constrained area to the market hub at Clearbrook. The HP Pipeline is designed to transport domestically-produced crude oil from the Bakken to a pipeline interconnect with the Enbridge Energy U.S. Mainline at the Clearbrook, Minnesota origin point set forth in Enbridge Energy’s tariff on file with the FERC.

Enbridge Energy’s 1,900-mile U.S. Mainline provides service from north to south from Neche, North Dakota on the Canadian border, through the Clearbrook market hub, and continuing downstream to Chicago, Illinois, with multiple receipt and delivery points along the

way. Enbridge Energy has allowed its affiliate, Enbridge Pipelines (North Dakota) LLC (“Enbridge ND”), to have an interconnection with the U.S. Mainline at the Clearbrook market hub. Enbridge ND has also recently applied for and received a declaratory order from the FERC for what it calls a “virtual expansion” of the Enbridge ND system that will allow it to deliver substantially more barrels of crude oil to Enbridge Energy’s U.S. Mainline at the Clearbrook market hub.<sup>7</sup> In addition, Enbridge Energy’s parent company is developing a new Enbridge Sandpiper Pipeline (“Enbridge Sandpiper Pipeline”), which is planned to interconnect with the Enbridge Energy Mainline at Clearbrook.<sup>8</sup> Thus, Enbridge Energy is readily accepting increased barrels of crude oil into its U.S. Mainline at Clearbrook, provided that those barrels come in from Enbridge-owned pipeline facilities.

High Prairie conducted a binding open season to solicit capacity commitments from shippers on the HP Pipeline from February 14 through April 5, 2012. The open season resulted in commitments from prospective shippers for a significant portion of High Prairie’s proposed capacity. A number of those commitments are contingent on High Prairie obtaining an interconnection with the Enbridge Energy U.S. Mainline at the Clearbrook market hub.

Prior to holding its open season, High Prairie commenced discussions with Enbridge Energy regarding the interconnection HP Pipeline will need at the Enbridge Energy market hub. At that time, High Prairie was told there would be no problem with granting the needed interconnection.

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<sup>7</sup> *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167 (2010).

<sup>8</sup> See <http://www.api-houston.org/presentations/claude-houston-api-20120410.pdf> at p. 18; [http://www.kfyrtv.com/News\\_Stories.asp?news=56293](http://www.kfyrtv.com/News_Stories.asp?news=56293); see also Attachment 1-2 to High Prairie’s Reply to Enbridge Energy at the Forest Service, *Enbridge in the Bakken*, North Dakota Governor’s Pipeline Summit, June 14, 2012, Presentation of Enbridge Pipelines Inc., at 6 (clearly showing that Sandpiper will interconnect with Enbridge Energy at Clearbrook). Under Enbridge Energy’s currently effective FERC tariffs, Enbridge Energy has an origin point at Clearbrook.

In discussions subsequent to the launch of the open season, Enbridge Energy requested that High Prairie complete and submit a New Service Request form in connection with its interconnection request. High Prairie completed the requested form and submitted it to Enbridge Energy on March 9.

Since then, High Prairie has had multiple discussions with Enbridge Energy regarding the proposed interconnection, and in those discussions Enbridge Energy expressly told High Prairie that it would not be allowed to interconnect at Clearbrook. In fact, on April 4, 2012, Steve Cabana, Enbridge Energy's Senior Business Development Representative, Mainline Business Development, left a voice mail with David Lytle, Senior Vice President, Business Development of Saddle Butte, regarding High Prairie's interconnection request. On the voice message, Mr. Cabana indicates unequivocally that Enbridge Energy is denying High Prairie's request for an interconnection at Clearbrook. This is nearly two months after Enbridge Energy had previously communicated to High Prairie that it would allow the interconnection at Clearbrook. Mr. Cabana's voice message also states that Enbridge Energy has the capacity to accept High Prairie's volumes, but that Enbridge Energy is reserving that capacity for its anticipated increased production from the Canadian tar sands. This is contrary to Enbridge Energy's most recent claim that it does not have sufficient available capacity to accommodate High Prairie's interconnection at Clearbrook.

During its discussions both before and after that voice mail, High Prairie has repeatedly made clear that it is willing to pay for the cost of all facilities needed for the interconnection, including but not limited to any tankage at Clearbrook to facilitate receipts and batching. High Prairie has also expressed its willingness to agree to any just, reasonable, and not unduly discriminatory conditions required by Enbridge Energy.

Following Enbridge Energy's denial of the interconnect, High Prairie has sought to obtain an order from the FERC or the U.S. Forest Service that would effectively require Enbridge Energy to grant the required interconnection on terms that are fair and reasonable. Enbridge Energy has taken the position that it can discriminate against High Prairie at will, and that there is not a thing those agencies can do about it:

As a common carrier, Enbridge stands ready to provide services to any shippers that meet the terms of its tariff (requiring shippers to have the ability to tender petroleum at an established receiving point on Enbridge's pipeline system). A pipeline carrier such as High Prairie, however, has no similar rights under the [Mineral Leasing Act] since that statute affords no such rights to other pipelines seeking interconnection.<sup>9</sup>

To date, neither agency has taken action to remedy the situation, though the matter remains pending before each of them and is being vigorously pursued by High Prairie. Copies of the filings High Prairie and Enbridge Energy have made with these agencies are attached hereto to assist the State Department in its understanding of what has transpired.

Despite all of these efforts, Enbridge Energy remains dug-in and unwilling to grant High Prairie an interconnection under any but the most patently unreasonable terms that are incompatible with the U.S. national interest and Enbridge Energy's common carrier obligations. The five conditions that Enbridge Energy has insisted upon, before it would even consider granting High Prairie an interconnection at Clearbrook, are as follows:

First, Enbridge Energy would require that the interconnect be conditioned on High Prairie agreeing to "backstop" a \$1 billion expansion project of downstream pipeline facilities between

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<sup>9</sup> Letter of Enbridge Energy, Limited Partnership to U.S. Forest Service at 2 (July 16, 2012) (attached hereto); *see also, e.g.*, Motion for Leave to Reply and Reply of Enbridge Energy, Limited Partnership to Answer of High Prairie Pipeline, LLC, FERC Docket No. OR12-17-000 at 4 (July 5, 2012) ("High Prairie contends that Enbridge Energy is required to grant *carrier* interconnections on a non-discriminatory basis under the [Interstate Commerce Act], and that if it refuses to do so, the [Federal Energy Regulatory] Commission is authorized to order the requested interconnection. That claim is without merit. In *Plantation* – and more recently in its May 18 Order – the Commission clearly found that the ICA neither requires oil pipelines to grant carrier-to-carrier interconnections nor allows the Commission to order such interconnections.") (attached hereto) (citations omitted).

Clearbrook, Minnesota and Superior, Wisconsin. Enbridge Energy is demanding that High Prairie agree to pay it for any revenue shortfalls that it incurs in the event that High Prairie's shippers fail to deliver certain specified levels to Enbridge Energy at Clearbrook.<sup>10</sup> Such a condition is completely unreasonable in that High Prairie has merely requested an interconnection, not an expansion of Enbridge Energy's downstream facilities. Furthermore, such a condition blatantly discriminates against U.S. oil production and in favor of Canadian production. Shippers of oil produced in the U.S. Bakken have as much right to use Enbridge Energy's existing U.S. Mainline as anyone. Their rights to access the U.S. Mainline cannot be conditioned on an expansion of downstream facilities. Moreover, all shippers on the Enbridge Energy U.S. Mainline would benefit from Enbridge Energy's expansion project since it also would allow Enbridge Energy's existing shippers to avoid having their shipments apportioned or prorated. Thus, in the event Enbridge Energy elects to expand its system in 2016 or 2017 to avoid potential constraints on its system, all shippers should bear their proportionate share of the expansion costs. It is not in the national interest to allow Enbridge Energy to unfairly force these costs on High Prairie instead.

Second, as a condition of High Prairie's interconnect, Enbridge Energy would subject U.S. oil production coming in through the High Prairie interconnection to a discriminatory surcharge in order to recover the estimated \$1 billion cost of the expansion project between Clearbrook and Superior.<sup>11</sup> As High Prairie understands it, Enbridge Energy intends to exempt its own existing shippers from this surcharge. In other words, U.S. oil production on the U.S. Mainline coming from HP Pipeline would be subject to the surcharge; Canadian oil production would not.

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<sup>10</sup> See Exhibit B to FERC Complaint, Affidavit of David Lytle Affidavit at par. 9e.

<sup>11</sup> *Id.* at par. 9b.

Third, Enbridge Energy would require that the interconnect be conditioned upon Enbridge Energy receiving the consent of certain of its existing shippers (*i.e.*, Canadian oil producers) to Enbridge Energy undertaking the \$1 billion expansion project.<sup>12</sup> It is not in the national interest for Canadian oil producers to be able to veto the rights of shippers of U.S. oil production to access Enbridge Energy’s U.S. Mainline.

Fourth, Enbridge Energy would require that the interconnect be conditioned on Enbridge Energy obtaining a declaratory order from the FERC approving, as High Prairie understands it, a methodology for allocating its capacity and/or recovering the costs of the expansion project.<sup>13</sup> No similar condition has been placed on the access rights of Canadian oil production.

Finally, Enbridge Energy would require High Prairie to give it a proverbial “blank check” to pay for any tankage facilities Enbridge Energy claims are necessary to interconnect at Clearbrook. High Prairie is willing to pay the reasonable costs of such facilities as are genuinely needed. However, Enbridge Energy has stated that the cost of these tankage facilities at Clearbrook would be approximately \$100 million, an amount that is both unsubstantiated and clearly unreasonable. There is no evidence that Enbridge Energy has insisted on a similar blank check from other pipelines seeking an interconnection, including those north of the border.

In short, the conditions insisted on by Enbridge Energy are so clearly unreasonable as to amount to a refusal to interconnect and to carry U.S. production delivered by High Prairie. The only justification Enbridge Energy has offered for this refusal relates to Enbridge Energy’s desire to preserve its own competitive position and that of its affiliated upstream pipelines.<sup>14</sup>

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<sup>12</sup> *Id.* at par. 9c.

<sup>13</sup> *Id.* at par. 9d.

<sup>14</sup> Enbridge Energy has stated that its pipeline facilities extending downstream from Clearbrook are underutilized. Even if the pipelines were running full, as a common carrier Enbridge Energy is prohibited from demonstrating preference for any one shipper or group of shippers, and is obligated to accept barrels from new shippers and to apportion/prorate its capacity on an equitable basis. Enbridge Energy has informed High Prairie that it has no contracts with shippers for any portion of the capacity on its pipeline facilities extending downstream from

Specifically, Enbridge Energy has expressed that although it has already allowed its affiliate to have an interconnection at Clearbrook, and although capacity exists today to accept up to 150,000 barrels of crude oil per day from the requested High Prairie interconnect,<sup>15</sup> Enbridge Energy expects that by 2016 or 2017 such capacity may become constrained due to increased volumes entering the U.S. Mainline from other sources, largely originating from the Canadian tar sands region.<sup>16</sup>

It is not in the U. S. national interest for Enbridge Energy to be able to withhold pipeline capacity for the exclusive benefit of Canadian oil production and others utilizing pipeline facilities owned by Enbridge Energy affiliates. For the reasons discussed more fully herein, High Prairie respectfully requests that the State Department amend Enbridge Energy's Presidential Permits to protect the national interest and to prohibit Enbridge Energy's exercise of undue discrimination against domestically produced crude oil.

## II.

### **Amendment of the Enbridge Energy Presidential Permits Is Required by the National Interest.**

#### **A. The National Interest Requires a Level Playing Field for U.S. Oil Producers.**

Promoting domestic oil production is paramount to the U.S. national interest. It is vital to the economy, national security, and foreign policy that the U.S. not be overly dependent on foreign oil.

During the State of the Union Address, the President laid out a blueprint for a new era of American energy – an economy fueled by homegrown and alternative

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Clearbrook, and the tariff for its U.S. Mainline does not allow for contractual arrangements providing preferential rights to capacity. Enbridge Energy shippers' capacity rights are determined month-to-month.

<sup>15</sup> The 150,000 barrels per day is HP Pipeline's design capacity and therefore represents the maximum amount that HP Pipeline could physically deliver to Enbridge Energy at Clearbrook on any given day.

<sup>16</sup> See Exhibit B to FERC Complaint, Affidavit of David Lytle at par. 8. In fact, Enbridge Energy reiterated to High Prairie that it is a common carrier with no contracts for capacity, and thus the projected capacity constraint is dependent upon a significant increase in month-to-month shipments of Canadian production and other oil moving through Enbridge Energy's Clearbrook interconnection with its affiliate Enbridge ND.

energy sources that will be designed in America and produced by American workers. Today, the President will visit Daimler Trucks North America Mt. Holly Truck Manufacturing Plant in Mt. Holly, NC to deliver remarks on American energy. While at the Daimler Plant, the President will tour the assembly line, see several of the alternative fuel models built there, and discuss the importance of taking a sustained, all-of-the-above approach on energy, responsibly expanding domestic production of natural gas and oil, which is currently at an eight year high, improving the efficiency of our cars and trucks, and making the long-term investments in alternatives to oil to provide American families the choices we all deserve. This strategy is a win for the economy, a win for energy security, and a win for national security.<sup>17</sup>

To encourage domestic oil production and give U.S. producers an opportunity to thrive and compete, it is critical that federal agencies take appropriate measures where they can to ensure a level playing field with foreign oil. This includes ensuring that pipelines traversing the U.S. do not unduly discriminate against U.S. production or in favor of Canadian production.

High Prairie is not requesting that it or its shippers of U.S. oil be granted preferential access over their Canadian counterparts. High Prairie merely seeks a level playing field that allows U.S. oil production equal access to valuable pipeline infrastructure in the U.S. The national interest demands that U.S. oil production receive that protection from the Federal government.

**B. The Interconnection Conditions Demanded by Enbridge Energy Are Incompatible with the National Interest and a Level Playing Field.**

**1. Allowing Enbridge Energy to Block Access of High Prairie's Shippers of U.S. Oil to the U.S. Mainline Unless High Prairie Agrees to Backstop a \$1 Billion Expansion Is Incompatible with the National Interest.**

Enbridge Energy has insisted that any interconnection at Clearbrook be conditioned upon High Prairie agreeing to backstop an expansion of Enbridge Energy's U.S. Mainline between

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<sup>17</sup> Fact Sheet: All-of-the-Above Approach to American Energy, at <http://www.whitehouse.gov/the-press-office/2012/03/07/fact-sheet-all-above-approach-american-energy> (emphasis added); *see also, e.g.,* [http://www.whitehouse.gov/sites/default/files/email-files/fact\\_sheet\\_obama\\_administration\\_92s\\_all\\_of\\_the\\_above\\_a\\_windows\\_approach\\_to\\_american\\_energy.pdf](http://www.whitehouse.gov/sites/default/files/email-files/fact_sheet_obama_administration_92s_all_of_the_above_a_windows_approach_to_american_energy.pdf) (stating that continuing to expand domestic oil and gas development plays a central role in increasing our nation's energy security and reducing our dependence on foreign oil).

Clearbrook, Minnesota and Superior, Wisconsin, at an estimated cost of \$1 billion. Such a condition is patently unreasonable in that High Prairie has not requested this expansion and is not seeking to utilize the expansion facilities.

Enbridge Energy's refusal to grant High Prairie's shippers access to its existing U.S. Mainline facilities unless High Prairie agrees to backstop an expansion of Enbridge Energy's downstream system creates an unlevel playing field and is contrary to the national interest. There is no evidence that Enbridge Energy has conditioned interconnections with unaffiliated pipelines, particularly those transporting Canadian production, on the non-affiliate agreeing to backstop an expansion of Enbridge Energy's facilities downstream of the interconnection.

Enbridge Energy is a common carrier required to grant non-discriminatory access to its existing system to all shippers, including new shippers, without regard to the nation of origin of an oil shipment. High Prairie is not requesting that Enbridge Energy expand its downstream system. Its interconnection request and the access of its shippers to the existing U.S. Mainline should not be conditioned on High Prairie backstopping a downstream pipeline project, particularly where Enbridge Energy has confirmed that it has unutilized capacity today, but that it is reserving such capacity for anticipated Canadian tar sands production.

**2. Allowing Enbridge Energy to Impose a Discriminatory Surcharge on Shippers of U.S. Oil Production Is Incompatible with the National Interest.**

Enbridge Energy is seeking to condition the interconnection on completion of a \$1 billion loop line project between Clearbrook and Superior and the ability to impose a surcharge on shippers of U.S. oil production to recover that sum. Enbridge Energy has asserted to the FERC that this condition is justified because "the only way to accommodate High Prairie's requested interconnection without current (and future) shippers incurring significant prorationing is either to expand capacity downstream of Clearbrook or to establish an alternative interconnection point

(i.e., Superior).”<sup>18</sup> However, Enbridge Energy’s claim is demonstrably false. On a voice mail that has been entered into the record at the FERC and which is attached hereto, Enbridge Energy’s Senior Business Development Representative, Mainline Business Development clearly states that Enbridge Energy has the capacity and is able to accept High Prairie’s volumes until 2016.<sup>19</sup> Thus, Enbridge Energy’s current shippers would not experience any prorationing as a result of the High Prairie interconnection, much less “significant” prorationing.

At some point in the future, estimated at 2016, such capacity *may* become constrained and such shippers *may* be prorationed. Enbridge Energy should not be permitted to discriminate against High Prairie and its shippers of U.S. oil production today by denying such access. Nor should it be allowed to provide an undue preference to Canadian production and other oil moving over the lines of Enbridge Energy’s affiliates by withholding capacity from the market to accommodate possible future growth in their volumes.

Enbridge Energy has held itself out to the State Department as being a common carrier pipeline that grants access to its existing facilities on equitable terms.<sup>20</sup> Enbridge Energy instead is favoring volumes moving over its and its affiliates’ upstream pipelines and their shippers in a way that produces an uneven playing field and is incompatible with the U.S. national interest.

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<sup>18</sup> Motion to Dismiss and Answer of Enbridge Energy, Limited Partnership to Complaint of High Prairie Pipeline, LLC, FERC Docket No. OR12-17-000 at p. 5 (attached hereto).

<sup>19</sup> See Attachment A to Answer; *see also*, Exhibit B to FERC Complaint, Affidavit of David Lytle at par. 8.

<sup>20</sup> *See, e.g.*, Application of Enbridge Energy Limited Partnership for a Presidential Permit, at 15 (June 4, 2010) (holding itself out as “an interstate common carrier of crude petroleum and natural gas liquids”); *Id.* at 2 (stating that the facilities Enbridge Energy was asking the State Department to approve were necessary to “avoid apportionment on the Enbridge Mainline system due to the forecasted growth in Alberta oil sands production”); *Id.* at 13 (same); U.S. Department of State, Final Environmental Impact Statement, Southern Lights 20-Inch Crude Line Project, “LSr Pipeline Project,” at xxv (stating that it was impossible to assess the air quality impacts of Enbridge Energy’s project because “Enbridge will operate the pipeline as a common carrier facility . . .”); *Id.* at 31 (stating that “Since Enbridge operates as a common carrier, the crude oil delivered via the LSr pipeline would not involve long-term commitments to specific refineries”); *Id.* at 3-78 (“The pipeline would be operated for common carrier traffic and therefore Enbridge has no way of ascertaining the ultimate destination of the transported crude”).

**3. It Is Not in the National Interest for Canadian Oil Producers to Have the Right to Veto Access of U.S. Oil Production to Enbridge Energy's U.S. Mainline.**

Enbridge Energy has insisted that any interconnection at Clearbrook be conditioned upon Enbridge Energy receiving the consent of its Canadian shippers to Enbridge Energy undertaking the \$1 billion loop line project. This condition would give Canadian oil producers the undue privilege of determining whether or not U.S. oil production is given access to the U.S. Mainline. Specifically, if the Canadian producers wished to preserve their current preferential or exclusive access to Enbridge Energy's facilities extending downstream of Clearbrook, they could simply decline to consent to the expansion. High Prairie submits that allowing Enbridge Energy to make the interconnection subject to the consent of Canadian oil producers creates an unlevel playing field and is contrary to the national interest.

**4. It Is Incompatible with the National Interest to Allow Enbridge Energy to Condition Access of U.S. Oil Production on Enbridge Energy Obtaining a Declaratory Order From the FERC.**

Enbridge Energy has insisted that any interconnection at Clearbrook be conditioned upon Enbridge Energy obtaining a declaratory order from the Commission regarding how it proposes to allocate capacity and/or recover the costs of its \$1 billion expansion project. This condition, like the others, produces an uneven playing field and is contrary to the national interest. High Prairie has requested an interconnection at Clearbrook with Enbridge Energy's existing common carrier system, not an expansion of that system. To condition the interconnection on Enbridge Energy obtaining favorable action from the Commission on a declaratory order related to a system expansion is contrary to Enbridge Energy's common carrier obligations and would unduly discriminate against High Prairie and U.S. oil production in favor of Canadian

production. No similar barrier has been erected to block Canadian production from accessing Enbridge Energy's U.S. Mainline. The national interest requires that U.S. oil production have equal access to this valuable pipeline infrastructure.

**5. It Is Not in the National Interest for Enbridge Energy to Condition Access to U.S. Oil Production to the U.S. Mainline on High Prairie's Willingness to Give Enbridge Energy a Blank Check.**

Enbridge Energy has also insisted that any interconnection to its U.S. Mainline at Clearbrook be conditioned upon High Prairie agreeing to give it a blank check for the cost of certain tankage facilities it claims would be necessary for an interconnection at Clearbrook. High Prairie has expressed its willingness to pay for the reasonable costs of facilities needed for the interconnection at Clearbrook, including but not limited to any tankage at Clearbrook to facilitate receipts and batching, notwithstanding the fact that Enbridge Energy's tariff rates on file at the FERC for transportation from Clearbrook expressly include the costs of receipt point tankage and terminalling.<sup>21</sup> High Prairie submits that it is not in the national interest for Enbridge Energy to be able to require that High Prairie give it a blank check to cover the costs of whatever additional interconnection facilities Enbridge Energy claims are necessary, without any rights to review the reasonableness and prudence of such costs and how they have been allocated among beneficiaries. This is particularly discriminatory because, as High Prairie understands it, Enbridge Energy has not required the same blank check and tankage facilities from its affiliate Enbridge ND, which is currently interconnected at Clearbrook.

As a threshold matter, it is unclear whether any new tankage is even necessary. Enbridge Energy has provided no explanation as to why High Prairie could not simply connect with

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<sup>21</sup> See FERC Complaint at pp. 4, 5, 9 11; Exhibit B to FERC Complaint, Affidavit of David Lytle at par. 5; see also Motion to Intervene and Protest of High Prairie Pipeline, LLC and Request for Expedited Action, Docket No. IS12-236-000 at pp. 3, 16 (May 4, 2012).

Enbridge Energy's existing tankage at Clearbrook.<sup>22</sup> Even assuming new tankage is required for the interconnection, Enbridge Energy has claimed that the cost of such tankage will be \$100 million, an amount that is unjustified. As Mr. David Wait, Saddle Butte's Vice President of Engineering, testifies in Attachment C to the High Prairie Answer filed at FERC (attached hereto), Enbridge Energy's \$100 million estimate is excessive and unreasonable.<sup>23</sup> Based on his experience developing and managing energy projects, including pipelines, Mr. Wait estimates the cost of the tankage that Enbridge Energy has stated will be required—specifically two 333,000 barrel tanks, complete with custody transfer metering and appurtenant pipe—should be no more than \$30 million.<sup>24</sup>

**C. Failure to Condition Enbridge Energy's Presidential Permits on Enbridge Energy Granting Non-Discriminatory Access to High Prairie's Shippers of U.S. Oil Will Result in Termination of High Prairie's HP Pipeline.**

As described above, many of the commitments High Prairie received in response to its open season are conditioned on HP Pipeline establishing an interconnect with Enbridge Energy at the Clearbrook market hub. By refusing to grant the interconnect requested by High Prairie, Enbridge Energy is denying these shippers of U.S. oil access to the Enbridge Energy U.S. Mainline and the refineries it serves, as well as the other pipelines with which it is interconnected downstream of Clearbrook. As Enbridge Energy has claimed in applying for President Permits from the State Department, increased pipeline infrastructure and interconnections are in the national interest because they provide shippers with needed optionality to adapt to market conditions:

[T]he Alberta Clipper Project affords shippers access to the widest variety of refinery hubs of any other major crude oil pipeline system in North America, providing optionality in infrastructure that allows shippers to adapt to market

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<sup>22</sup> See Attachment B to Answer, Affidavit of David Lytle at par. 5.

<sup>23</sup> Attachment C to Answer, Affidavit of David Wait, at pars. 4-5.

<sup>24</sup> *Id.* at pars. 2 & 5.

conditions. As a direct result, shippers have the added flexibility to immediately respond to market conditions, such as oversupply in one area caused by a refinery outage or supply constraints in another area due to infrastructure damages such as that caused by the 2005 hurricane season in the Gulf Coast region.<sup>25</sup>

Yet, Enbridge Energy's denial of the interconnection at issue here not only significantly diminishes the optionality HP Pipeline can offer to shippers of U.S. oil, but will result in termination of the HP Pipeline altogether, harming the national interest.

High Prairie agrees that access to the Enbridge Energy U.S. Mainline, the world's longest crude oil pipeline, is essential for shippers to access broad markets and satisfy market demands. By its own statement, Enbridge Energy should not be able to limit such access to Canadian shippers while denying access to domestically produced crude oil. If High Prairie is unable to interconnect with Enbridge Energy at the Clearbrook market hub, High Prairie will not be able to execute transportation service agreements with a number of shippers of U.S. oil that made conditional commitments to the HP Pipeline. The loss of shippers that made conditional commitments to HP Pipeline will result in a significant or complete devaluation of the project's economics and termination of the project.

**D. Termination of the HP Pipeline Will Harm Domestic U.S. Oil Production, the National Interest, and Tribal Interests.**

According to the most recent estimates, the Bakken formation holds between 6 and 24 billion barrels of recoverable oil.<sup>26</sup> If constructed, the HP Pipeline will enhance the Nation's aim of energy independence and the ability of U.S. oil production in the Bakken to meet the demands of U.S. refineries. As indicated by the shipper commitments received in High Prairie's open season, shippers of U.S. oil view the HP Pipeline as able to provide a valuable transportation function, if an interconnection with Enbridge Energy's U.S. Mainline at Clearbrook can be

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<sup>25</sup> See, e.g., Application of Enbridge Energy Limited Partnership for a Presidential Permit, at 14 (June 4, 2010).

<sup>26</sup> See, e.g., <http://oilshalegas.com/bakkenshale.html>

secured. Thus, there is clear market support for the HP Pipeline, and its construction is in the national interest.

The HP Pipeline is also expected to create significant employment opportunities here in the U.S., including as many as 2,500 manufacturing and construction jobs. These new jobs, as well as construction expenditures and the resulting capital projects, will result in significant new tax revenues that benefit local, state and regional economies around western North Dakota and eastern Minnesota.

In addition, the HP Pipeline will allow the U.S. to maximize royalty revenues for landowners, particularly with respect to production on Indian lands in the Bakken. The crude oil carried on High Prairie's system will be domestically produced light sweet crude oil, much of it from lands held in trust by the U.S. Department of the Interior on behalf of a federally-recognized Indian nation, the Mandan, Hidatsa & Arikara ("MHA") Nation, and its individual members. Executive Order 13337 contemplates State Department consideration of tribal interests where appropriate in the issuance of Presidential Permits.<sup>27</sup> The federal government has a longstanding fiduciary obligation to Indian Tribes. "[T]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.'"<sup>28</sup>

As the MHA Nation has explained in a filing at the FERC, allowing Enbridge Energy to refuse to grant High Prairie an interconnection is contrary to the interests of the MHA Indian nation:

There is insufficient pipeline capacity to transport oil and gas produced on the Reservation to energy markets outside of North Dakota. Most of the oil being transported from and through our Reservation is moving by truck or by rail. Simply stated, the roads were not designed for such heavy loads. Our roads are being destroyed by these oil trucks, and we are not able to ensure that our tribal

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<sup>27</sup> See Executive Order 13337, Section 1(e).

<sup>28</sup> *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993)(quoting *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987)).

members can safely travel to school or to work. Moreover, transportation by both truck and rail results in lower royalty payments to our Indian mineral owners . . .<sup>29</sup>

Enbridge Energy's refusal to grant High Prairie's request for an interconnection also will have a negative impact on shippers seeking to use the HP Pipeline and on crude oil production in North Dakota. In the absence of an interconnect between the HP Pipeline and Enbridge Energy at Clearbrook, it is likely there will be insufficient pipeline capacity for all North Dakota crude oil production to leave North Dakota by pipeline. In that situation, High Prairie believes the barrels for which there is insufficient pipeline capacity will be transported, if they move at all, using the far less economic alternatives of rail and possibly truck, or a combination thereof.

In applying for regulatory approvals for its U.S. Mainline facilities, Enbridge Energy has emphasized the critical need for new pipeline infrastructure due to the lack of economic alternatives. The need is even more compelling today with the boom in oil production from the Bakken formation.

Transporting the 150,000 barrels-per-day (the capacity of the HP Pipeline) of crude oil by rail from Alexander, North Dakota (the HP Pipeline origin) is not a good option. In fact, based on the calculations Enbridge presented to the Minnesota Public Utilities Commission in obtaining regulatory approvals for its LSr Pipeline Project, it would take hundreds, if not thousands, of rail cars to replace the 150,000 barrels-per-day capacity of the HP Pipeline.<sup>30</sup> The

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<sup>29</sup> See the attached Letter from the Mandan, Hidatsa & Arikara Nation filed at FERC in Docket No. OR12-17-000.

<sup>30</sup> In applying for a Certificate of Need and Route Permit for its LSr Project from the Minnesota Public Utilities Commission, Enbridge stated that transporting 186,000 barrels-per-day by rail from Cromer, Manitoba to Clearbrook would require a total of 26 trains of approximately 110 cars each to be in constant motion. Enbridge also estimated that the travel time between Cromer and Clearbrook would be five days. In all, Enbridge claimed that 3,120 tank cars would be required to carry the oil that could be handled by its LSr Project. See Enbridge Pipelines (Southern Lights) LLC's Proposed Findings of Fact, Conclusions of Law, and Recommendation, Minnesota Public Utilities Commission, MPUC Docket No. PL9/CN-07-464 at paragraphs 89-99 (Feb. 1, 2008) (available at <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId=%7B1FB16C8C-EF5B-4354-A7B6-CEBF79DACB1B%7D&documentTitle=4916214>).

The distance between the Alexander origin point of the HP Pipeline and its Clearbrook destination point is about 60 miles greater than the distance between Cromer and Clearbrook. Using Enbridge's own numbers, one could thus conclude that replacing the 150,000 barrels-per-day capacity of the HP Pipeline would take a total of 21

cost of such rail transportation is far greater than transportation by pipeline,<sup>31</sup> and it is unclear whether such rail facilities are even available.

Transporting 150,000 barrels-per-day of crude oil by truck is also not a good option. Using Enbridge's own numbers presented to the Minnesota Public Utilities Commission, trucking the 150,000 barrels per day would require thousands of trucks.<sup>32</sup> It is unlikely there are sufficient vehicles or drivers available to accommodate such a massive increase in truck traffic. Even if transportation of the 150,000 barrels-per-day of crude oil were possible by truck, the cost of doing so is far higher than the cost of shipping the oil by pipeline.

The U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (“PHMSA”) has determined that, in general, truck transportation of crude oil is significantly more hazardous than pipeline transportation. For example, PHMSA statistics show that transporting crude oil by truck presents a far greater risk of death—87 times greater—than transportation by pipeline.<sup>33</sup> Similarly, transporting crude oil by truck is nearly 35 times more likely to result in a fire or explosion than if the same oil is transported by way of a pipeline.<sup>34</sup>

Further evidence that the cost to shippers of transporting their oil by truck or rail would be significantly greater than the cost of transportation by pipeline is provided by the shippers’

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trains of approximately 110 cars each to be in constant motion. In all, approximately 2,516 rail cars would be required. Since the 150,000 barrels-per-day design capacity of the HP Pipeline is 80.65 percent of the 186,000 barrels-per-day capacity of the LSr Project, Enbridge’s figures for the LSr Project have been multiplied by 0.8065 to derive the comparable numbers that would be required to replace the HP Pipeline.

<sup>31</sup> Exhibit A to FERC Complaint, Affidavit of Levi Rozga at pars. 9-10.

<sup>32</sup> In the Minnesota Public Utilities Commission filing referenced in the preceding footnote, Enbridge stated that moving 186,000 barrels per day from Cromer to Clearbrook by truck would require a daily, 700-mile roundtrip by a fleet of approximately 3,000 trucks. Using those numbers, one can conclude that it would take approximately 2,419 trucks to replace the HP Pipeline (multiplying 3,000 by 0.8065)

<sup>33</sup> See

[http://phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=2c6924cc45ea4110VgnVCM1000009ed07898RCRD&vgnnextchannel=f7280665b91ac010VgnVCM1000008049a8c0RCRD&vgnnextfmt=print#QA\\_0](http://phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=2c6924cc45ea4110VgnVCM1000009ed07898RCRD&vgnnextchannel=f7280665b91ac010VgnVCM1000008049a8c0RCRD&vgnnextfmt=print#QA_0)

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

willingness to make commitments to the HP Pipeline, conditioned upon High Prairie obtaining an interconnection with Enbridge Energy at the Clearbrook market hub.

For all these reasons, termination of the HP Pipeline would clearly not be in the national interest.

### **III.**

#### **Documents in Support of this Application for Amendment**

To assist the State Department in its consideration of this Application, High Prairie is attaching hereto all documents filed in related proceedings before the FERC and the U.S. Forest Service.

### **IV.**

#### **Relief Requested**

The State Department has full authority under Executive Order 13337 and Article 1 of Enbridge Energy's Presidential Permits to amend those permits at any time when the national interest so requires and to impose "such terms and conditions as the national interest may in the Secretary's judgment require." High Prairie respectfully requests that the State Department exercise this authority by amending Enbridge Energy's Presidential Permits by adding a new article providing that:

The permittee shall provide open and non-discriminatory access to the pipeline system of which the United States facilities are a part. To afford such access, the permittee shall grant interconnection requests from other pipelines at any existing receipt point on the permittee's system on fair and reasonable terms, without regard to whether the other pipeline is an affiliate of permittee or whether the U.S. is the nation of origin of shipments on such other pipeline. Permittee may require interconnecting pipelines to bear the reasonable, verifiable, and prudently incurred costs of such interconnection. However, permittee shall not seek to condition an interconnection on (a) the interconnecting pipeline agreeing to backstop expansions of permittee's other facilities, (b) a discriminatory surcharge; (c) permittee's existing shippers consenting to the interconnection; or (d) receipt of a declaratory order from the FERC.

V.

**Conclusion**

WHEREFORE, for the foregoing reasons, High Prairie respectfully requests that the State Department: (i) find that Enbridge Energy's Presidential Permits, as currently constituted, are no longer in the national interest due to changed circumstances; and (ii) amend those Presidential Permits as provided herein to ensure a level playing field for U.S. oil producers and as required by the national interest.

Respectfully submitted,

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DATED: July 31, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of July, 2012, I have served the foregoing document by electronic mail and/or first-class mail on the permittee, Enbridge Energy, Limited Partnership.

/s/ Glenn S. Benson  
Glenn S. Benson