BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
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Dan Lipschultz	Commissioner
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In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border	MPUC PL-9/CN-14-916

PETITION OF INTERVENOR FRIENDS OF THE HEADWATERS FOR RECONSIDERATION AND REHEARING OF COMMISSION'S JANUARY 23, 2019 ORDER APPROVING COMPLIANCE FILINGS AS MODIFIED AND DENYING MOTION

Dated: February 12, 2019

INTRODUCTION

Pursuant to Minn. Stat. § 216B.27, intervenor Friends of the Headwaters (FOH) submits this petition for reconsideration and rehearing of the Commission's January 23, 2019 Order Approving Compliance Filings as Modified and Denying Motion. This is the order approving modifications to the Commission's previous Certificate of Need ("CN") Order. The original CN Order has already been through the reconsideration process, and FOH will not repeat the arguments made at that time. Because the court of appeals has ruled that appeals from the CN should wait until after the reconsideration process for the January 23 Order is concluded, and FOH does restate and incorporate those arguments into this document to preserve its right to appeal on those matters as well.

FOH's focus in this petition is on the financial assurance issues. FOH's position remains that neither the "parental guaranty" nor Enbridge's private insurance coverage will provide adequate assurance that the environment will be protected or that taxpayers will not be left holding the bag if a catastrophic oil spill occurs or the pipeline needs to be decommissioned. None of these measures will significantly reduce the negative "consequences of granting the Certificate of Need" and they cannot support any ultimate conclusion that the consequences of granting the CN are "more favorable than the consequences of denying the certificate." Minn. R. 7851.0120.C.

- The financial risk posed by a new Line 3 over its lifetime is still much greater than Enbridge has represented or the Commission has apparently accepted.
- The so-called "parental guaranty," even with the modifications the Commission ordered, will do little or nothing to prevent an insolvent Enbridge from avoiding its responsibilities.

- Enbridge's private insurance may well not cover oil spills, is inadequate under any circumstances, and there is no provision to address cancellation of coverage or denial of a claim.[1]

ARGUMENT

I. ENBRIDGE'S "RISK CONSEQUENCE CALCULATION" IS TOO LOW, AND THEREFORE MINNESOTA'S TAXPAYERS STILL FACE A SUBSTANTIAL RISK.

To assess the utility of any financial assurance proposal requires an estimate of what the potential financial risks are. Enbridge has supplied a $1.4 billion figure, and, although Enbridge has never disclosed in any detail how it arrived at that figure, it is almost certainly too low for several reasons.

First, its release volume assumptions are way too low. Enbridge assumes that its active leak detection and response controls will always work, and therefore that the maximum amount of time between a pipeline rupture and valves being closed will be 13 minutes. That is extremely optimistic. For Enbridge's 2010 Kalamazoo spill, it was *17 hours*, not 13 minutes between the rupture and closing off the pipeline. The Pipeline and Hazardous Materials Safety Administration ("PHMSA") Part 194 regulations define a worst-case discharge as:

> The pipeline's maximum release time in hours, plus the maximum shutdown response time in hours (based on *historic discharge data* or in the absence of such data, the operator's best estimate), multiplied by the maximum flow rate expressed in barrels per hour (based on the maximum daily capacity of the pipeline), plus the largest line drainage volume after shutdown of the line section(s) in the response zone expressed in barrels.

49 C.F.R. § 194.105.

[1] The Commission has punted the question of a decommissioning trust to a later docket. FOH and others have previously raised concerns about the proposed decommissioning trust, and Enbridge's failure to propose a reasonable mechanism to accomplish the task of assuring that funds are available for those purposes when they are needed. Of course, the PUC should make it clear that arriving at a satisfactory decommissioning trust arrangement must precede going forward with this project or putting it into service.

Enbridge's "historic discharge data" clearly does not support a maximum shutdown response time of 13 minutes. Even the most advanced "Computational Pipeline Monitoring" ("CPM") and "Supervisory Control and Data Acquisition" ("SCADA") systems sometimes fail, and FOH's previous filings listed a number of recent cases where that happened. The recent assessment of potential costs of a spill from Enbridge Line 5 under the Straits of Mackinac cited an acknowledgement from Enbridge itself that it could take up to two hours to respond. Using that figure, two hours of spilling oil from a ruptured new Line 3 would release between 63,000 and 73,000 barrels, which could "oil" a substantial amount of shoreline or wetland along this route. The team evaluating potential Line 5 costs in Michigan concluded, based on historic data from recent major spills, that even with a midrange estimate, primary restoration costs alone for a spill there would exceed $1.8 billion.

FOH requested that the Commission order a similar analysis of a worst-case spill scenario along the route of a new Line 3. The Commission, however, declined, and has so far decided to take Enbridge's estimates as its own. That, we submit, is a mistake. Those estimates must be made at the outset, with credible release volumes, and then, if the pipeline goes into service, those estimates should be reviewed periodically, with thorough input from natural resource experts and from the public.

Second, any estimate of response and restoration costs has to be based on what it would cost *the government* to do the work, not what it might cost a solvent Enbridge. The government has no expertise, equipment, or personnel to deal with a spill and it will cost them much more to do this work if Enbridge is unable or unwilling to do it. Neither Enbridge nor the Commission has attempted to make any such calculation.

Third, there are entire categories of damages that Enbridge and the Commission continue to ignore, even though they are spelled out as part of a responsible party's liability under the Oil Pollution Act of 1990. That includes natural resource damages, property damages, loss of subsistence use, losses of taxes, royalties, fees, profits, earning capacity, and damages for net costs of providing public services. 33 U.S.C. § 2702(b)(2)(A)-(F). Without those estimates, the Commission has no basis for assessing whether any financial assurance package is adequate.

By accepting Enbridge's improperly low estimates of the potential financial costs involved, the Commission is increasing the risk that the cost of addressing a spill will be borne by Minnesota's taxpayers. On rehearing, the Commission should take testimony from expert witnesses, and input from the public, to make a more reasonable calculation of how much financial assurance should be required.

II. THE PROPOSED PARENTAL GUARANTY, EVEN WITH THE MODIFICATIONS ORDERED BY THE COMMISSION, WILL DO LITTLE TO PREVENT AN INSOLVENT ENBRIDGE FROM ESCAPING LIABILITY.

No agency, federal or state, that has developed financial assurance rules in the past couple of decades has concluded that "corporate guarantees" or any other form of "self-bonding" is an adequate method for providing financial assurance. The Commission nevertheless has moved forward with that as the core element, and it has largely discarded the previous experience of other government agencies. That, FOH submits, has been a significant error. As those agencies have all concluded, there are several reasons why "corporate guarantees" and "self-bonding" do not provide adequate assurance. In addition, the particular instrument the Commission has now approved has fundamental flaws that will reduce its effectiveness even further.

A. No “corporate guarantee” has any value if not coupled with a robust financial test to judge the financial viability of the guarantor.

As the recent bankruptcies of entitles like Pacific Gas & Electric, FirstEnergy, Peabody, and others who are involved in public utility regulation make clear, financial situations can deteriorate, sometimes very rapidly, and even giant companies like Enbridge, Inc. can rapidly become too weak to self-insure, to guarantee anyone else’s obligations, or to secure alternative financial responsibility instruments. It is too late to ask a company (or a bank or surety or insurer) to come up with hundreds of millions of financial assurance when the company no longer has the money, or its other creditors effectively stand in the way.

It is therefore critical that there be a strong mechanism in place to evaluate the financial wherewithal of the guarantor on an ongoing basis. Yearly perusal of annual financial statements, which is all the PUC is requiring, will provide, at best, a snapshot, and, at worst, a completely misleading picture.

FOH renews its suggestion that the Commission consider adopting the criteria the EPA and the Nuclear Regulatory Commission use to assess whether guarantees or self-insurance can be a useful approach to financial assurance:

1. At least one long-term corporate credit rating equal to or higher than A- as issued by Standard & Poor’s (“S&P”) or an equivalent as issued by another Nationally Recognized Statistical Rating Organization (“NRSRO”);
2. Tangible net worth of at least six times the amount of potential environmental obligations, including guarantees, covered by the financial test; and

3. Assets located in the United States amounting to either at least ninety percent of total assets, or at least six times the amount of financial responsibility obligations covered by the financial test.[2]

For the EPA (or at least the EPA before January 20, 2017), there were too many risks to consider self-insurance or guarantees even if the guarantors could meet those criteria. Nevertheless, application of these criteria would provide some assurance, if coupled with a notice-of-change-of-circumstances requirement, ongoing access to financial information, and a maximum 120-day deadline for Enbridge to provide additional financial assurance if their financial situation deteriorates. Without that kind of robust financial test in place, guarantees like the one the PUC has approved in this case are worth very little.

B. The guaranty document itself is not strong enough to provide much assurance.

The first major weakness in the proposed guarantee is the lack of a financial test for determining whether and when a corporate guarantee might be deemed acceptable, or whether third-party financial assurance such as letters of credit or surety bonds must be posted, or a separate trust fund established.[3] But there remain other serious problems as well.

There is still no provision making Enbridge, Inc., its successors and assigns, jointly and severally liable with any subsidiary for all response costs and the six categories of damages outlined in the Oil Pollution Control Act of 1990, 33 U.S.C. § 2702(b). There is no reason,

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[2] EPA, *Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry,"* Proposed 40 C.F.R. § 320.43(a)(1), 82 Fed. Reg. 3388, 3492 (Jan. 11, 2017). These are the same criteria used in Resource Conservation and Recovery Act ("RCRA") financial test provisions for hazardous waste, treatment, storage, and disposal facilities ("TSDFs"), 40 C.F.R. pts. 264 & 265, subpart H Financial Assurance, the Underground Injection Controls ("UIC") program, EPA, *Guidance Documents for Underground Injection Control Financial Responsibilities*, https://www.epa.gov/uic/guidance-documents-underground-injection-control-financial-responsibilities, and for CERCLA (Superfund) orders and settlements. 82 Fed. Reg. at 3437-39.

[3] FOH does not believe a corporate guarantee should ever be acceptable. The willingness of federal and state agencies to accept "self-bonding" in the past has left the public with hundreds of billions of dollars of clean-up expenses. Neither the Minnesota DNR, nor the U.S. Bureau of Land Management ("BLM"), nor the U.S. Forest Service find these kinds of guarantees acceptable, and neither should the PUC.

under any circumstances, to require two stages of litigation, one against some wholly-owned subsidiary to reach a judgment or settlement, and then a second against Enbridge, Inc. if the subsidiary defaults. Enbridge's recent decision to "roll up" all of its former "master limited partnerships" into the parent company only makes it more foolish not to simply hold Enbridge, Inc. (and its successors and assigns) liable and directly suable in the first place.[4] Every lawsuit requires time and money and increases the likelihood of being forced into settlements that do not fully protect the public. That is not a situation the PUC should tolerate.

Likewise, the guarantee needs to require, not only that Enbridge, Inc. agree to be suable in Minnesota, and that disputes will be resolved according to Minnesota law, but must also set up a registered agent for service of process in Minnesota, and subject itself and all of its assets to attachment or other enforcement proceedings in Minnesota. If the only entity that will accept Minnesota service is a subsidiary that is defaulting on its obligations, the guarantee will be more difficult to enforce than it should be. Likewise, if Enbridge, Inc.'s assets are not reachable in Minnesota, no judgment will be particularly meaningful.

In a bankruptcy proceeding, of course, simple contractual obligations like the one proposed in this guarantee are treated as general unsecured claims and go to the back of the line. To avoid that, it would be necessary to grant Minnesota a security interest in Enbridge, Inc. property sufficient to cover possible claims. Nothing like that is contemplated in this proposed guaranty instrument. If Enbridge, Inc., or its creditors, wish to avoid responsibility for a Minnesota spill, the guarantee will not pose much of an obstacle.

[4] It is not clear whether Enbridge Energy, Limited Partnership will continue to exist, or will be turned into a subsidiary corporation, or be simply folded into a larger entity or even Enbridge, Inc. itself. Obviously, to the extent Minnesota is left with Enbridge, Inc. guaranteeing Enbridge, Inc.'s own liabilities, not much will have been accomplished.

III. THE INSURANCE "REQUIREMENTS" THE COMMISSION HAS REQUESTED OF ENBRIDGE WILL NOT BE ADEQUATE TO PROTECT MINNESOTA'S TAXPAYERS EITHER.

The Department of Commerce has identified a number of weaknesses in the private insurance package Enbridge has offered and which has emerged from this process, and FOH shares those concerns. On a broader level, FOH has identified several minimum requirements for any kind of third-party coverage, whether it be in the form of private insurance, letters of credit, surety bonds, trust funds, or combinations of any or all of those mechanisms:

1. Any guarantor must be qualified and non-captive. It still appears that Enbridge's general liability insurance program relies to some extent on "affiliated insurance companies," where Enbridge has some kind of ownership or control. That should not be acceptable.
2. There must be adequate coverage, equal at least to estimated worst-case response costs and damages (and ultimately decommissioning costs). See Section I, *supra*.
3. State or tribal officials should be able to make direct claims against the guarantor. This is typically why trust funds, letters of credit, and surety bonds are far better than private insurance. They can be set up so that payment is made upon presentation of a written state or tribal instrument saying that a payment has not been made, or required performance has not occurred. Under the arrangement the PUC has approved, the state would have to make a claim against Enbridge (maybe an Enbridge subsidiary first and then Enbridge, Inc.), and then Enbridge would presumably make a claim against its insurer. That does little to provide any additional assurance that funds will be available to state officials to do a clean-up or otherwise respond to a spill in a timely manner. Insurers often deny big claims, and hope to negotiate favorable

settlements, particularly if the insured's financial needs are acute. That should not be good enough for the PUC,

4. There must be cancellation protection. Banks, sureties, and insurance companies know how to cancel coverage if they see big claims coming. If Enbridge's financial situation were to deteriorate to a point where a default is imminent or likely, and cancellations of coverage happen, there is no way Enbridge will be able to find alternative financial assurance. The Commission's "insistence" that it be allowed to ask Enbridge for alternative financial assurance if its other coverage has disappeared will therefore be of little help. The other agencies who have confronted this problem have all required companies like Enbridge to set up standby trusts. In whatever kind of coverage is ultimately required—letters of credit, surety bonds, or insurance—there needs to be automatic renewal each year, no cancellation without a minimum of 120 days notice, and payment of the entire amount of the coverage into the standby trust if Enbridge has not secured alternative financial assurance acceptable to the state and the tribes within 90 days of that notice date. That way, the guarantor—bank, surety, insurer—that wants to cancel its coverage of Enbridge's liabilities must assist Enbridge to find a satisfactory alternative or face paying its limits, or "penal sum" into the standby trust.

Enbridge's objection to these conditions would no doubt be that such coverage is unavailable or too expensive. And, it appears the PUC is prepared to excuse Enbridge from providing any additional coverage if an insurance broker says that the coverage is unavailable or too expensive. The remedy, however, if third-party guarantees are not available or Enbridge is unwilling to absorb the cost, is to require Enbridge to set up a trust fund, independent of

Enbridge or any affiliate, with sufficient funds, directly accessible by the states or the tribes, to meet the cost of the government(s) having to perform Enbridge's obligations.

The PUC should learn from the experiences of other agencies, who have been burned by self-bonding, self-insurance, corporate guarantees, or third-party guarantees like insurance that somehow disappear when the money is needed or require years of litigation to collect. There is, of course, no way to reduce the taxpayer risk to zero with something like a crude oil pipeline. But there are better ways to reduce that risk than the feeble mechanisms the PUC has found acceptable. The PUC should reopen the financial assurance issue, allow the parties to submit expert testimony subject to cross-examination, solicit the input of experts from other agencies, and develop a financial assurance plan that will provide real protection. If the terms prove to be unacceptable to Enbridge, then the CN should be withdrawn.

CONCLUSION

For the reasons stated above, and in the previous filings of FOH and other intervening parties including the department of commerce, FOH respectfully requests that the CN as modified by the Commission's January 23, 2019 Order be withdrawn, that the Commission set up proceedings to take expert testimony and secure public input on the financial assurance issues, and that FOH's suggestions be incorporated into any final result. FOH, of course, also seeks withdrawal of the CN for all the reasons it articulated in the previous reconsideration process.

Respectfully Submitted,

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