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In the Matter of the Decommissioning Trust
Fund for the Enbridge Energy, Limited
Partnership Line 3 Replacement Pipeline

Docket No. PL-9/CN-21-823

**SUPPLEMENTAL COMMENTS OF THE
MINNESOTA DEPARTMENT OF
COMMERCE**

INTRODUCTION

The Department remains deeply concerned about the “purpose trust” structure Enbridge proposed for the decommissioning trust agreement and continues to urge the Commission to adopt, instead, a traditional form of trust. Previously, the Department provided a red-lined revision of Enbridge’s draft which reflected a traditional trust with Enbridge as the identified settlor, the Commission as the named beneficiary, and the Department as the Trust Protector responsible for enforcing the terms of the trust. A clean copy of the Department’s proposed Trust Agreement is attached to these comments as Attachment 1A.

In its reply comments, Enbridge offered revisions to the Department’s draft trust, indicating that, while it believed a traditional trust form was “not optimal,”¹ it would be acceptable with certain revisions. Accordingly, these supplemental comments focus on Enbridge’s proposed revisions to the Department’s trust agreement. A section-by-section response to Enbridge’s Attachment B accompanies these supplemental comments as Attachment 2.

¹ Enbridge Reply Comments (4/12/23) at p. 2.

DISCUSSION

A. The Department's Positions Are Consistent with the Commission's Orders and Furthering the Public Interest.

Enbridge attempts to box in the Commission and Department by claiming prejudgment that requires specific provisions of Canadian trusts and precludes the funding structure recommended by the Department.² This prejudgment not only did not occur, but even if it had, should not prevent the Commission from exercising its judgement to work in the public interest.

Enbridge incorrectly claims that “the Commission’s previous orders require a trust that is similar to those required in Canada, and which includes collections over the expected 50-year life of the pipeline.”³ In fact, the Commission has not rigidly bound itself to the specific requirements or structure dictated by a foreign government, nor any specific timeframe for funding the decommissioning. Instead, the Commission recognized that for “one of the most consequential modifications to the certificate of need” there were still “concerns about the Decommissioning Trust and how it would be structured” that would need to be addressed a separate docket.⁴

In 2017, the Department recommended that if the Commission issued a certificate of need, it should require several modifications to ensure that the Line 3 replacement project met the statutory criteria. Among these was the recommendation to establish a decommissioning trust fund to ensure funds are available to decommission the pipeline. In making this recommendation, the Department emphasized that “[i]f the market for crude oil erodes significantly, Enbridge may be unable to operate, in which case it is unclear what entity would be responsible for the

² Enbridge Reply Comments (4/12/23) at pp. 4, 6–7.

³ Enbridge Reply Comments (4/12/23) at p. 4.

⁴ Docket 14-916 Mtg. Tr. at 56–57 (Nov. 19, 2018).

decommissioning.”⁵ Enbridge has acknowledged that a purpose of the trust is to assure that funds are available for decommissioning if Enbridge is no longer operating.⁶

The Commission determined that a certificate of need for the line would be contingent on the creation and funding of a decommissioning trust fund.⁷ To that end, the Commission ordered that Enbridge make a compliance filing with proposed terms and conditions “based on” decommissioning trusts in Canada.⁸ The Commission did not require the ultimate trust be based on Canadian law, but instead provided Enbridge general direction for consideration.

Following further filings, the Commission opened the current docket for the “purpose of establishing the terms and conditions of the Decommissioning Trust.”⁹ The Commission did not order specific terms and conditions or bind itself to another country’s requirements. Instead, the Commission ordered Enbridge to consult with the Department and “analyze for Commission consideration the benefits of establishing the trust consistent with the Environmental Protection Agency and Bureau of Land Management rules for financial assurances for decommissioning trust funds, as well as the Canadian National Energy Board’s provisions.”¹⁰ The Commission understood that this is a complex undertaking and thus required Enbridge to “analyze” the

⁵ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, PL-9/CN-14-916, Direct Testimony of Kate O’Connell at 117 (Sept. 11, 2017) (eDocket No. [20179-135395-06](#)).

⁶ Docket 14-916 Mtg. Tr. at 129, 202 (June 26, 2018).

⁷ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, PL-9/CN-14-916, REISSUED SEPT. 5, 2018 ORDER at 38 (May 1, 2020) (Reissued CN Order).

⁸ *Id.*; see also Docket 14-916 Mtg. Tr. at 57-58 (Nov. 19, 2018).

⁹ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, PL-9/CN-14-916, REISSUED JAN. 23, 2019 ORDER at 14 (May 1, 2020)

¹⁰ *Id.*

provisions of Canadian and U.S. federal trust provisions to determine if those structures would work in Minnesota's best interest. That analysis is what is occurring here in these comments.

The Commission should not accept Enbridge's invitation to rewrite history in a way that would confine the Commission to following Enbridge's hand-picked provisions of the Canadian framework. Instead, the Commission should continue its practice of seeking the most robust information possible to develop the best way forward to protect Minnesota for decades to come.

B. The Department Has the Necessary Independence and Expertise to Serve as Trust Protector.

Enbridge disagrees with the appointment of the Department as Trust Protector, arguing a lack of clarity regarding the Department's authority and that the Department lacks the necessary resources, independence, and expertise.¹¹ None of these objections have merit.

First, the Commissioner of the Department of Commerce "is responsible for the enforcement of chapters 216A, 216B, and 237 and the orders of the commission issued pursuant to those chapters."¹² Therefore, if the Commission has authority to issue an order, the Department has the authority to enforce it. Here, the Department's authority stems from the Commission's order that its approval of Enbridge's certificate of need to construct Line 93 be conditioned on the creation of a decommissioning trust fund to assure the availability of funds to pay for decommissioning the line.¹³ Enbridge has never challenged the Commission's authority to require Enbridge to fund a decommissioning trust fund as a condition of granting Enbridge's petition for a certificate of need or to require that the trust fund be established on reasonable terms for the protection of the public interest. The time to raise such a challenge is long past. If the Commission

¹¹ Enbridge Reply Comments (4/12/23) at p. 10.

¹² Minn. Stat. § 216A.07, subd. 2.

¹³ Reissued CN Order.

orders that the Department serve in the role of Trust Protector, that is all the authority that the Department requires.

Second, Enbridge asserts that the Trust Protector “should be an individual . . . who can act as an independent fiduciary – not under the control of any interested parties”¹⁴ These requirements do not weigh against the Department serving as Trust Protector. The Department is not under the control of any interested party and is able to act as an independent fiduciary on behalf of Minnesotans. Enbridge does not explain how its suggestion that it should be the one to propose the Trust Protector¹⁵ advances its professed desire for independence of the Trust Protector. There is no reason for Enbridge to have any role in selecting who will be responsible for enforcing the trust terms.

Third, Enbridge’s professed concerns about the adequacy of the Department’s resources and expertise are similarly misplaced. Enbridge suggests that the primary function of the Trust Protector is to approve distributions from the trust.¹⁶ In fact, the role of the Trust Protector is not limited to approving distributions, but rather, extends to matters relating to removal of the trustee,¹⁷ appointment of successor trustees,¹⁸ assignment of rights and obligations,¹⁹ approval of the settlement of claims,²⁰ execution of amendments to the trust agreement,²¹ and general responsibility to enforce the trust agreement terms.²² The approval of distributions is only part, albeit an important part, of the Trust Protector’s role. Each of these responsibilities will require

¹⁴ Enbridge Reply Comments (4/12/23) at p. 10.

¹⁵ Enbridge Reply Comments (4/12/23) at p. 10.

¹⁶ Enbridge Reply Comments (4/12/23) at Attachment B, p. 6.

¹⁷ Department Reply Comments (3/13/23) at Attachment 1, Section 4.2.

¹⁸ Department Reply Comments (3/13/23) at Attachment 1, Section 4.3.

¹⁹ Department Reply Comments (3/13/23) at Attachment 1, Section 1.6.

²⁰ Department Reply Comments (3/13/23) at Attachment 1, Section 5.1(3).

²¹ Department Reply Comments (3/13/23) at Attachment 1, Section 1.2.

²² Department Reply Comments (3/13/23) at Attachment 1, Section 5.2.

consideration of the public interest. The Department is ready, willing, and able to perform these functions. To the extent that it requires special expertise, the Department has the ability to retain consultants to advise and assist it, as it has done in this case.

If the Commission determines that it does not want the Department to serve as Trust Protector, it will need to make an alternative selection at the outset of the trust; appointment of a Trust Protector cannot wait until the trust begins making distributions. Selecting an independent Trust Protector or successor Trust Protector should not be subject to Enbridge's approval,

C. The Trust Agreement Should Expressly Confirm Enbridge's Obligation to Fully Fund the Trust.

Enbridge proposes omitting from the Department's draft a number of provisions that specify Enbridge's obligation to fund the trust. Enbridge's stated basis for omitting these provisions is that they will not be enforced by the trustee.²³ Enbridge's argument fails to recognize that these provisions are intended to be enforced by the Trust Protector, not the trustee. Contrary to Enbridge's suggestion, the trust agreement is not solely limited to provisions that affect the trustee.

It is troubling that, after agreeing to the establishment of a decommissioning trust fund and a rough estimate of the contribution needed in order to obtain the necessary permits to build its pipeline, Enbridge now seeks to avoid having those terms included into a legally binding contract establishing such fund. The trust agreement must set out Enbridge's responsibilities – including the responsibility to fund the trust in the manner ordered by the Commission – to assure that the purposes of the trust are accomplished.

As explained in previous comments, the Department is very concerned that continued delay in requiring Enbridge to contribute to the trust fund is increasing the risk that the trust will not

²³ Enbridge Reply Comments (4/12/23) at Attachment B, pp. 4-5.

have sufficient assets when it comes time to decommission the line. Enbridge has rejected including language establishing an amount or schedule for contributions in the trust agreement, insisting that funding requirements should be addressed in a separate Commission order, to avoid having to amend the trust agreement if future circumstances should require that the funding amount or timing be changed.

The Department, by way of compromise, agreed that this approach was acceptable so long as the trust agreement clearly established Enbridge's commitment to comply with the Commission's orders regarding funding. Enbridge, in its proposed revision of the Department's draft trust agreement, stripped out key language regarding its obligation to fund the trust, arguing that such language is "unclear," "unnecessary," and "potentially confusing."²⁴ How the inclusion of such a key provision of the trust could be unnecessary or confusing is baffling and Enbridge has provided no evidence to support such a bold claim. The Commission should reject Enbridge's proposed revisions and require the inclusion of this fundamental tenet in the trust agreement.

Uncertainty regarding the economic life of the line makes it all the more imperative that the trust be fully-funded as soon as reasonably possible. The Department shares Friends of the Headwaters' concern that the line has been in operation for more than two and a half years and Enbridge has yet to contribute anything toward decommissioning costs. The time remaining for Enbridge to fund the trust dwindles by the day.

Enbridge's plan to make minimum equal payments limited to the amount that it collects from shippers until some as-yet unknown time in the distant future is highly risky. When the Commission issued its Reissue Order in the certificate of need proceeding ordering Enbridge to create a decommissioning trust, the line's anticipated life was 50 years. In comments Enbridge

²⁴ Enbridge Reply Comments (4/12/23) at Attachment B, p. 5.

filed with the Commission two years later, it stated that it had entered into an agreement with shippers that provided for a 30-year economic life.²⁵ The economic life of Enbridge's mainline system is only 20 years. The pace and intensity of efforts to decarbonize our economy continue to increase, which will challenge the line's economic viability.

The Commission should not gamble that Enbridge, a company whose continued financial health is closely tied to the carbon economy and depends heavily on continued consumption of fossil fuels, will still be around on October 1, 2051, which is the date by which Enbridge says that the trust will be fully funded.²⁶ The potential harm to the public interest if there are not sufficient assets in the trust when needed far outweighs any harm that might result to Enbridge if the trust is sufficiently funded some number of years before the funds are needed.

CONCLUSION

The Department requests that the Commission adopt the Trust Agreement as proposed by the Department, as set forth in the document attached to these comments as Attachment 1A.

²⁵ Enbridge Initial Comments (5/10/22) at p. 9.

²⁶ Enbridge Initial Comments (5/10/22) at p. 10.