ENVIRONMENTAL LAW
& POLICY CENTER

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Public Advisor
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Via eFiling

RE: Supplemental Comment of Friends of the Headwaters (FOH)

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

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

Dear Commission:

Thank you for the opportunity to submit supplemental comments to respond to previous comments filed on the issue of the "decommissioning trust" Enbridge has been obligated to establish since before it put Line 3, now Line 93, into operation. Friends of the Headwaters (FOH) generally endorses the comments made by DOC-DER, Honor the Earth, PEER, and other interested parties. But FOH remains concerned about the position Enbridge is taking, particularly on three issues.

First of all, FOH contends this Commission should reject Enbridge's argument that a decommissioning "trust" where Enbridge is the beneficiary would meet the Commission's requirements. The rationale for the decommissioning or abandonment trust is twofold: (1) to assure, as with any financial assurance requirement, that sufficient funds would be available to the *State* to do the necessary work if Enbridge defaults; and (2) to protect those funds from other Enbridge creditors, particularly in a bankruptcy proceeding. Enbridge's proposal would accomplish neither of those purposes.

The purpose of a financial assurance mechanism like a decommissioning or abandonment trust is to ensure that necessary remediation work still be done if the responsible party—in this case, Enbridge or some Enbridge entity—is unable or unwilling to do it. Enbridge promises to do the work decades hence, or even Enbridge promises to create decommissioning "reserves" today, will be of little value when its pipelines no longer generate revenue and other creditors are at the door with legitimate or priority claims against Enbridge's remaining assets.

If Enbridge defaults, then it will fall to the State or to landowners to complete the decommissioning project. And it will cost more than it would cost Enbridge. A state agency would need to hire the necessary expertise *and* the construction contractors *and* comply with state procurement regulations, so, as FOH explained in its earlier comments, the estimate of costs needed to determine how much money needs to be available must take those significant extra costs into account. Enbridge's solution to a situation where it defaults is no solution at all. Enbridge simply says that the State and the landowners will be free not to do the decommissioning at all and allow the State's citizens and its environment to bear that risk. That is exactly what this Commission was trying to avoid.

The "trust" mechanism Enbridge proposes would not insulate the resources from other creditor claims. Trusts generally involve three parties—the *settlor,* the *trustee,* and the *beneficiary*. The settlor creates (or "settles") the trust and the trustee manages the trust assets for the benefit of the beneficiary. There are two primary types of trusts: revocable trusts and irrevocable trusts. The assets of a revocable trust remain under the control of the settlor, are effectively still owned by the settlor, and therefore become part of the bankruptcy estate if the settlor files for bankruptcy protection.[1] The assets of an irrevocable trust, on the other hand, are effectively under the control of, and effectively owned by the beneficiary as soon as the trust is created. When the settlor and the beneficiary are the same entity, however, the trust cannot truly be irrevocable; indeed, in those circumstances, there really is no trust at all. Parties cannot insulate their assets from creditors simply by putting them into a trust created for their own benefit.

The Bankruptcy Code is pretty clear on the subject. Section 541(c)(1)(A) provides that "an interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law that restricts or conditions transfer of such interest by the debtor." 11 U.S.C. § 541(c)(1)(A). The only exception is when there is "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law." *Id.* § 541(c)(2). If Enbridge is both the settlor and the sole beneficiary, then it has the right to modify the "trust" arrangement, any restrictions are unenforceable, and those assets will be part of any bankruptcy estate. That means those funds would be distributed to creditors—whether in reorganization or liquidation proceedings—based on the priorities in the Bankruptcy Code, not on the terms of any so-called "trust" agreement or how this Commission would prefer Enbridge's assets be spent. Secured creditors would have top priority; unsecured creditors would recover what is left according to the Code's list of priorities.

Enbridge suggests that some states, other than Minnesota, do allow settlors broad authority to dedicate funds to particular purposes, and thereby protect those funds from creditors. In particular, Enbridge references South Dakota, which allows so-called "purpose trusts" for indefinite periods without designated beneficiaries. SDCL § 55-1-20.[2] SDCL 55-1-21.4 creates

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[1] Minn. Stat. § 501C.0604 ("While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.")

[2] Of course, there are specific statutes and regulations that require decommissioning or similar trusts that look like the "purpose trusts" Enbridge identifies, including the Canadian laws governing pipeline abandonment, and some

a new party—an "enforcer," either designated in a trust instrument or appointed by a court, to enforce "the purpose of a purpose trust." An "enforcer" cannot also be the "trustee." *Id.* There is no readily available case law on these provisions, which were apparently adopted in 2018. SL 2018, ch. 275, § 9. And it is not at all clear whether or under what circumstances these kinds of "purpose trusts" are effective in keeping trust assets out of a bankruptcy estate and beyond the reach of creditors. If the State of Minnesota were to become the "enforcer," it is conceivable that some such structure could be useful for protection against other creditors. It would not, however, solve the problem of what to do if Enbridge defaults, because the State would be the party that would need access to the funds to do the decommissioning work. That means the logical decision is to make the State the beneficiary, not just some kind of "enforcer."

Making the State a beneficiary does not mean that Enbridge would not have access to those funds to do the decommissioning or abandonment work. As with other financial assurance mechanisms, trust fund assets can be used to reimburse or even advance the necessary funds. If the trust assets are set at an amount to cover what it would cost the State, Enbridge would have a strong incentive to do the work on its own, and recover *more* than its costs as the work is completed. Decommissioning the pipeline becomes a source of revenue, rather than a deadweight legacy cost, and that incentive aligns with what this Commission wants to accomplish.

Second, FOH urges the Commission to insist that any decommissioning trust be fully funded—meaning what it would cost the State, not Enbridge, to decommission or "abandon" the pipeline—as soon as practicable, certainly well before 30 years have elapsed. Again, to reach climate goals, Minnesota, the United States, and indeed the world must almost entirely switch away from fossil fuels by 2045, and that will not and cannot happen all at once. The likelihood that the useful life of Line 93 and Enbridge's Mainline system will extend 30 years is very low. The more likely scenario is that the revenue Enbridge receives from its pipelines will be reduced as the switch away from fossil fuels takes place, and so the risk that decommissioning or abandonment will be necessary in the next ten to twenty years becomes quite real. To leave the decommissioning trust unfunded only increases the risk that Minnesota's taxpayers, landowners, and environment will be left holding the bag. That is not an outcome this Commission should allow.

Finally, FOH expressed its continuing frustration over Enbridge's delay. Contrary to Enbridge's assertion, it is perfectly reasonable for this Commission to require a concrete proposal, with trust instrument language, an aggressive funding timetable, and robust cost estimates to which the public can respond and comment. Enbridge proposes that it can set something up in the next ten months, if it is allowed to do so on its own, without giving the public the opportunity to comment on a concrete proposal. Presumably at that time—May 10, 2023, according to Enbridge—parties, including DOC-DER, could advise the Commission whether what Enbridge has come up with satisfies the Commission's intent, but, by then, even

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U.S. regulations. *E.g.* Nuclear Regulatory Commission, *Financial Assurance Requirements for Decommissioning Nuclear Power Reactors,* 63 Fed. Reg. 50,465 (Sept. 22, 1998); *see generally* 10 C.F.R. pts. 30 and 50. The challenge here, however, is to use existing general legal frameworks governing trusts rather than wait for some indefinite legislative or rulemaking process specific to oil pipeline decommissioning or abandonment.

more time will have passed and the penalty for having to go back to the drawing board will be that much greater. DOC-DER's previous proposal, which still would take more time than FOH believes is necessary, would still allow all of the parties to make significant progress toward developing a decommissioning trust that would serve the Commission's purposes and protect the public.

Again, thank you for the opportunity to comment. FOH looks forward to the opportunity to respond to a detailed proposal from Enbridge.

Respectfully submitted,

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