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November 5, 2018

Mr. Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101

PUBLIC DOCUMENT

Re: ***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 Docket No. PL9/CN-14-916
OAH Docket No. 65-2500-32764

Dear Mr. Wolf:

Pursuant to the Minnesota Public Utilities Commission's (Commission) Notice of Comment Period on Line 3 Project Accidental Release Cost Model Results, Decommissioning Cost Estimate, and Revised Parental Guaranty Filing (Notice), dated October 29, 2018, the Minnesota Department of Commerce, Division of Energy Resources (Department or DOC DER) provides these Reply Comments, along with attachments, to Enbridge's (the applicant) October 16, 2018 filing. For the Commission's convenience, DOC DER also provides its recommendations regarding all conditions or modifications to the certificate of need (CN) for which the Commission directed Enbridge to file proposed terms:

- Parental Guaranty for Environmental Damages
- Decommissioning Trust Fund
- Neutral Footprint Program
- General Liability and Environmental Impairment Liability Insurance
- Landowner Choice Program

1. Parental Guaranty

DOC DER Recommendation: As previously presented at the Commission's September 11 hearing, the Department continues to recommend that the Commission adopt the Parental Guaranty proposed by the Department, which it believes is consistent with the Commission's September 5, 2018 Order Granting Certificate of Need as Modified and Requiring Filings (Order).

At the Commission's September 11 hearing, the Department summarized six key differences between the Department's recommended Parental Guaranty, filed on July 30, 2018, and Enbridge's updated recommended Parental Guaranty, filed on September 7, 2018. The six key differences were summarized in a handout, which is attached to these Reply Comments as Attachment A.

In its October 16 filing, Enbridge amended its proposed Parental Guaranty as follows:

1. Section 1(v) – Revised the definition of "Occurrence" to clarify that it includes environmental damages arising from "the construction or operation" of the Project to more closely match the language in Ordering Paragraph 1A of the CN Order;

2. Section 6 – Revised to address DOC DER's concerns regarding the potential for Enbridge Inc. to raise latent defenses to avoid performing under the Parental Guaranty. The language "or demand for payment" was deleted and a clause "v" was added to clarify that Enbridge Inc. cannot later assert defenses that could have previously been asserted by Enbridge Energy, Limited Partnership with respect to the Obligations.

3. Section 10 – Added a new paragraph to specifically address the language in the third bullet under Ordering Paragraph 1A of the CN Order acknowledging that upon any final determination by the Commission that the Guaranteed Party's and Guarantor's at-the-ready financial resources and insurance coverage are insufficient to respond to and remediate a full-bore spill modeled pursuant to the CN Order, the Commission shall have the authority, subject to notice and an opportunity for comment, to require additional financial assurances beyond the Guaranty to cover any identified deficit.

The Department appreciates Enbridge's efforts to address many of the Department's concerns. Enbridge's change to Section 1 partially cures the issue DOC DER identified related to the limited scope of the obligations guaranteed. Enbridge's amended language expands the covered risks to include releases occurring during construction and operation of the pipeline. The prior language limited the obligation to releases during the operation of the pipeline. DOC DER continues to believe that a broader form of guaranty is warranted. Specifically, the Department recommends that the Guaranty ensure that damages caused by the pipeline are guaranteed irrespective of whether they relate to an environmental release. DOC DER incorporates by reference its prior submissions on this issue.

Enbridge's change to Section 6 cures the issue identified by DOC DER concerning latent defenses. However, DOC DER continues to believe that a complete waiver by the Guarantor of

defenses is appropriate, given the close relationship and identity of interests between Enbridge and the parent Guarantor. DOC DER incorporates by reference its prior submissions on this issue.

Enbridge's change to Section 10 is an improvement from Enbridge's prior proposal and partially corrects the defect of its prior proposed form of guaranty. As certain commissioners noted at the September 11 hearing, Enbridge's prior proposal did not include a mechanism for moving to an alternative form of security if the Guarantor's financial health deteriorates—as the Commission had explicitly required. Enbridge committed at the hearing to propose language on this issue, and has done so. DOC DER previously made a proposal on this same issue, which would be an appropriate alternative security mechanism. With some modifications, however, Enbridge's new proposed language may meet the Commission's requirements. DOC DER proposes two changes:

First, DOC DER proposes that language be added to Enbridge's proposed Parental Guaranty Agreement, Section 10 requiring the Guarantor to provide financial data to the Department of Commerce or the Commission annually upon request:

> Upon request of the Commission or the Department of Commerce, the Guarantor will, within 90 days after the end of each fiscal year of the Guarantor, deliver to the Commission and the Department of Commerce a copy of Guarantor's consolidated and consolidating financial statements for such fiscal year, audited by independent certified public accountants (including a balance sheet, income statement, statement of cash flows, statement of shareholder's equity, and, if prepared, such accountants' letter to management).

Without such a provision, it would be difficult for the Department of Commerce or the Commission to know whether the alternative form of security may be needed to support the guaranteed obligations.

Second, DOC DER proposes that language be added explicitly making the alternative security mechanism enforceable in district court. This provision would remove any uncertainty as to whether the Commission (or another State agency or office), either as a legal or practical matter, could enforce this provision once the pipeline is complete and the CN is no longer needed by Enbridge. DOC DER proposes adding the following language to Section 10:

> Guarantor acknowledges and consents to suit in the courts of the State of Minnesota for specific performance or other relief by Beneficiary State of Minnesota upon any breach or failure of Guarantor to comply with the terms of Section 10.

Finally, there are three additional items raised by DOC DER that remain unaddressed by the changes to the Parental Guaranty Enbridge proposed on October 16, 2018. First, ensuring a

broad range of Beneficiaries and free assignability of Beneficiaries' interest in the Guaranty (Item 1). To remedy Item 1, DOC DER proposed language to make clear that as lands affected by the pipeline change hands, the new owners become Beneficiaries of the Guaranty. Second, permitting immediate direct action against the Guarantor in the event of an Occurrence (Item 3). DOC DER requests that the Commission reference the Department's prior submissions on Item 3. Third, eliminating procedural obstacles to Beneficiaries' assertion of a claim on the Guaranty (Item 4). Item 4 concerns the forms and manner of notice a Beneficiary must give in order to avail itself of the benefit of the Guaranty. Whether through DOC DER's proposed language on this issue, or other language, provisions should be added to make clear that where the Guarantor has actual knowledge of a claim, it cannot defeat the claim by arguing that a Beneficiary failed to follow the exact notice procedures set forth in the Guaranty.

2. Decommissioning Trust Fund

DOC DER Recommendation: The Department continues to recommend that Enbridge file a decommissioning trust fund proposal for the Commission's consideration. Specifically, Enbridge should propose a decommission trust fund proposal that:

- Is consistent with, and requires no changes to, existing Minnesota and federal law;
- Includes collections over the expected 50-year life of Line 3 project in Minnesota at least to equal approximately $1.5 billion (USD), as adjusted for inflation;[1]
- Is not controlled by Enbridge Inc. or any present or future affiliated entity;
- Is established only for the purpose of deactivating, monitoring, and removing the pipeline together with remediation of the soil at the time Line 3 is taken out of service in Minnesota; and
- Includes other provisions as required by the Commission.

In its September 7 filing, Enbridge stated that it has continued to make progress on establishment of the fund and address the several of these issues. Enbridge stated:

> [W]hile numerous federal and state tax and trust law issues exist that make it impossible to completely mirror the National Energy Board (NEB) decommissioning trust fund, Enbridge will establish a decommissioning trust fund under existing laws and will work in parallel to improve the functionality of the fund through legislative and other efforts. Since its July 30, 2018 filing, Enbridge has continued to make progress on establishment of the fund and address the several of these issues by:

[1] Because Enbridge has estimated the cost of removal to be $983,000,000, the Commission may wish to state this requirement at that amount if it deems Enbridge's calculation to be reasonable. DOC DER notes that Enbridge's calculation includes a contingency amount of $108,000,000, or 13%, which Enbridge states is required by NEB.

- Drafting the trust agreement;
- Identifying and beginning to interview potential trustees;
- Analyzing complex state and federal legal and tax issues surrounding proposed trust; and
- Gathering the information necessary to calculate the estimated decommissioning costs using the NEB-approved calculation methodology.

Enbridge continues to analyze potential legislative and legal efforts that will allow the Line 3 Replacement Decommissioning Trust Fund to function more like the NEB decommissioning trust funds in all regards, but those efforts are not an impediment to establishing a fund prior to Line 3 Replacement going into service, and the trust agreement is drafted in a manner that will allow the trust to benefit from those future efforts, should they prove successful.

On October 16, 2018, Enbridge concluded that the cost to remove the proposed Line 3 would be approximately $983,000,000. DOC DER appreciates Enbridge's progress to date, outlined in its September 7, 2018 filing, to approximate the costs of removal of the proposed Line 3. DOC DER continues to recommend that the Commission require Enbridge to file a decommission trust fund proposal for the Commission's approval prior to the proposed Line 3 going into service.

3. Neutral Footprint Program

In staff briefing papers for the September 11, 2018 hearing, staff agreed with DOC DER's recommendation that the calculation of incremental energy should be the difference between the baseline annual energy used for the existing Line 3 and the annual energy used for the new Line 3, not the difference between Mainline System usage before and after new Line 3 is placed into service.

DOC DER Recommendation: The Department recommends that the Commission require Enbridge to use the requirements and calculations pursuant to the Commission's August 18, 2017 filing in Docket No. PL9/CN 13-153. Consistent with the neutral footprint approved in the Phase II Docket, the annual calculation of incremental energy and RECs to be purchased by Enbridge should be based on the difference between:

- A representative baseline level of electricity used for the existing Line 3 and
- The annual electricity used for the new Line 3.

4. General Liability and Environmental Impairment Liability Insurance

DOC DER Recommendation: The Department continues to recommend, consistent with the Commission's Order, that the Commission adopt DOC DER's general liability (GL) and environmental impairment liability (EIL) insurance-related recommendations.

In Enbridge's September 7 and September 10 letters (collectively, the September 10 letter), Enbridge provided additional information related to its general liability insurance program. The Department has reviewed all of the Enbridge insurance filings to date and due to the complexity of Enbridge's GL insurance program, the Department recommends that the Commission require Enbridge to file annually an analysis of the clear and unambiguous policy language that demonstrates Enbridge's compliance with the required coverage under all then-effective insurance policies. This means that Enbridge should be prohibited from commencing construction of the Line 3 Project until the Commission has reviewed and approved Enbridge's revised insurance filing, and that Enbridge must continue to demonstrate to the Commission annually its compliance with the insurance-related modification during Enbridge's operation of a new Line 3. Specifically, the applicant must show that one or more of the then-effective policies provide the required insurance and that language of other policies does not diminish or eliminate coverage so claimed to exist by Enbridge. The Department also recommends correction to the self-insured requirement discussed below.

A. Enbridge's September 10 Public Explanation of Policies

DOC DER found Enbridge's September 10 letter helpful by providing updated titles to the policies that were not included in its response to DOC DER IR No. 311.[2] Therefore, in the September 10 letter, Enbridge's addition to its title for the Canadian umbrella policy with the term "Master Policy" provided additional information that has been useful for DOC DER's analysis. Previously, the "Canadian Umbrella" policy had not been identified as a "master" policy so as to potentially affect the "U.S. Umbrella" policy coverage.

B. Relevance of the Underlying Commercial GL Policies

All four policies provided by Enbridge are relevant to the issue of insurance coverage, to the extent that Enbridge intends to use similar language for GL insurance of the proposed Line 3 Project. The relevance of the underlying commercial GL policies is that both the Canadian and U.S. commercial policies are clear and unambiguous in their *exclusion* of coverage for crude oil damage.[3]

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[2] DOC DER August 31 filing, Attachment 2 at 001-002.

[3] DOC DER August 31 filing, Attachment 2 at DOC DER 186 Endorsement 11 (Canadian commercial GL policy) and DOC DER 206-207 para B.12 and C11 (U.S. commercial GL policy).

It follows that insurance policies can also be clear as to *inclusion* of coverage for damages caused by crude oil spills. DOC DER continues to recommend that Enbridge's GL insurance policies include language that provides clear and unambiguous coverage for damages arising out of crude oil spills on a new Line 3.

DOC DER also continues to recommend, and as ordered by the Commission, that the Commission require Enbridge to secure EIL coverage rather than relying solely on its commercial GL insurance program as sufficient. Enbridge's September 10 letter on page eight states that neither commercial GL policy, U.S. or Canadian, provides pollution coverage, or contains terms "representative of the terms in the rest" of Enbridge's $940 million general liability insurance program, and that it "is not their purpose" to provide pollution coverage.[4] These statements raise concerns about the coverage in Enbridge's umbrella policies if Enbridge intends to rely for compliance purposes on language similar to such policies.

C. U.S. Umbrella Policy

DOC DER's reading of the plain language of the U.S. umbrella policy indicates there is no meaningful coverage of damages from crude oil spills.[5] While Enbridge did not analyze its language with specificity, it defaulted to the Canadian umbrella policy by stating that the U.S. and Canadian umbrella policies "are appropriately read together" and that the Canadian umbrella ensures "broader coverage is available *to the extent there were any real ambiguity* in Policy 2 (Attachment 311B)."[6] There is no real ambiguity, of the U.S. umbrella policy, it is clear that damages for crude oil spills are largely excluded.

DOC DER remains concerned that the plain language exclusions in the U.S. umbrella for what Enbridge characterizes as "underground facilities" constitute a material exclusion of coverage for damages for crude oil spills. Enbridge suggested that the quoted term is included in the policy for purposes of "discussion," a position with which DOC DER strongly disagrees. DOC DER reiterates that a policy's actual words do matter and "are intended" to mean something.[7] The current U.S. umbrella policy would require extensive re-writing if it were to conform to Enbridge's desired statement, which is that the U.S. umbrella policy "does not exclude Enbridge's midstream or pipeline operations."[8]

Clear, unambiguous coverage language is the state's largest protection in the event of a significant spill for which Enbridge entities lack financial ability or will to pay damages as well as clean up and remediation. Recent history bears out the importance of policy language—Enbridge's 2010 GL insurance policy was successfully challenged by some insurers, which resulted in denial of $85 million in coverage for the Kalamazoo, Michigan crude oil spill. Again,

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[4] Enbridge September 10 Letter at 8.
[5] *Id.* 8–9.
[6] *Id.* at 9 (emphasis in italics added).
[7] *See, e.g.*, Enbridge September 10 Letter at 9.
[8] *See id.*

the Department recommends for a future Line 3 that where language appears unclear, impractical or susceptible to challenge, the Commission require new, clear language.

D. Canadian Master Umbrella

In its September 10 letter, Enbridge emphasized that the Canadian umbrella is a "master policy" that may provide coverage for damages caused by crude oil spills on a future Line 3. For this reason, Enbridge claims that the Department's conclusions regarding Enbridge's currently effective GL insurance coverage are "wrong."[9] DOC DER's analysis of the GL insurance program remains that of concern, even with the inclusion of the "master policy."

1. The Department Agrees that the Canadian Umbrella Policy is a Master Policy

The Department agrees that the Canadian umbrella policy includes additional language making it a "master" policy that may provide coverage where it is denied under the U.S. umbrella and that potential coverage for crude oil-related damages is not as concerning as the terms of the U.S. umbrella policy alone. The language is found in Endorsement 16 with the actual title, **[TRADE SECRET DATA HAS BEEN EXCISED].**

[9] Enbridge's September 10 Letter at 8-9.

The Department agrees with Enbridge that, under the "Difference in Conditions" provision 1.2, the Canadian umbrella applies where it provides broader coverage than the U.S. umbrella policy.

2. The Department's Concerns Regarding the Canadian Umbrella

The Department remains concerned regarding coverage under the Canadian umbrella policy due to Enbridge's apparent view that the U.S. umbrella policy does cover oil spills, a view with which DOC DER disagrees. Even if it were true that the U.S. umbrella policy provides meaningful coverage for damages for oil spills, the following language of the Canadian umbrella policy is of concern, if strictly construed, that significant delay could occur **[TRADE SECRET DATA HAS BEEN EXCISED].**

For this reason, coverage under the Canadian umbrella may be unreliable.

In addition, the Department is concerned about the Canadian umbrella's coverage for damages associated with crude oil spills. These concerns largely revolve around common flaws or weaknesses in the GL policies identified by the Department's witness in this case.[10] Enbridge's analysis of the Canadian umbrella's coverage consists mainly of its statement that the policy includes Time Element coverage of 30 days discovery and 90 days reporting for sudden and accidental pollution, "again ensuring that the broader coverage is available to the extent there were any real ambiguity in Policy 2 (Attachment 311B)."[11]

The Canadian umbrella policy provides[12] **[TRADE SECRET DATA HAS BEEN EXCISED]** discovery of a spill within 30 days and reporting within 90 days.

Of concern to the Department is language that requires the pollution to be **[TRADE SECRET DATA HAS BEEN EXCISED].**[13] Definition of the term **[TRADE SECRET DATA HAS BEEN EXCISED].**[14]

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[10] *See, e.g.,* Ex. DER-5, DD-1 at 5, 10, 21, 25 (Dybdahl Direct). Mr. Dybdahl did not endorse Enbridge's then-current GL policy. *See, e.g.*, Evid. Hrg. Tr. Vol. 8B (Nov. 14, 2017) at 132, 133, 171 (Dybdahl); Ex. DER-5, DD-1 at 24 (Dybdahl Direct).
[11] Enbridge September 10 Letter at 9.
[12] DOC DER August 31 filing, Attachment 2 at DOC DER 011-013 (Canadian umbrella).
[13] *Id.* at DOC DER 012, para. 15.1 (a).

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The factual record in this docket includes testimony by witnesses and members of the public that **[TRADE SECRET DATA HAS BEEN EXCISED].**

Similarly, the Final Revised Environmental Impact Statement provides that the likelihood of a pipeline release at some time over its operating life "is not low."[15] The exclusion provides that if the pollution **[TRADE SECRET DATA HAS BEEN EXCISED]** then coverage is excluded. Given the record in this proceeding, coverage under the Canadian umbrella policy is unreliable on this point.

Another concern is that the insured must demonstrate that **[TRADE SECRET DATA HAS BEEN EXCISED]**

making coverage under the Canadian umbrella policy unreliable on this point**.**

Further, **[TRADE SECRET DATA HAS BEEN EXCISED]** within thirty (30) days of the beginning of the leak.[16] Given the potential difficulty of identifying the date on which a leak from an underground crude oil pipeline begins, strict construction of this coverage factor may render coverage unreliable on this point.

Finally, the Canadian umbrella is silent as to coverage, if any, for the costs of cleaning up the environmental damage caused by a crude oil spill. Cleanup costs and other expenses can run over a billion dollars, as shown by the $1.2 billion resulting from the 2010 Kalamazoo, Michigan spill.[17] Mr. Dybdahl testified that no one can be certain of such coverage when a GL policy is silent in this regard.[18] The Canadian umbrella policy also is silent as to coverage, if any, for restoration costs and natural resources damages, which Mr. Dybdahl noted are common flaws of

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[14] DOC DER August 31 filing, Attachment 2 at DOC DER 017, para. 19 (a Canadian umbrella definition) (emphasis in italics added).
[15] Ex. EERA-42 at 10-1 (Final Revised FEIS) (Minnesota Department of Commerce, Energy and Environmental Review and Analysis Division, Final Environmental Impact Statement Proposed Line 3 Pipeline Project, Revised, February 12, 2018).
[16] *Id.* at DOC DER 012, para. 15.1 (c).
[17] *See, e.g.*, Ex. DER-5, DD-1 at 5, 21 (Dybdahl Direct).
[18] *Id.* at 27.

GL insurance policies as to coverage for damages associated with crude oil spills.[19] Again, coverage under the Canadian umbrella is unreliable on these important points.[20]

E. Enbridge Misstated the Insurance Modification: Market Availability of EIL Insurance and Reinstatement of Limits is Based on Market Availability to Pipelines Generally

Contrary to Enbridge's statement on page 9 of its September 10 Letter, the Department's insurance-related recommendation did not hinge on whether EIL insurance in the future is available *solely to Enbridge* in the marketplace on commercially reasonable terms, but whether it is available *to pipelines generally* in the marketplace on such terms.[21] If Enbridge were to show that the required insurance is not available to oil pipeline companies generally, the Department recommends that the Commission determine that the insurance is unavailable to Enbridge. The Department provided in its July 30 filing a suggestion as to how Enbridge may be able to make the required showing.[22]

F. Correction Regarding the Self-Insured Limit

In its July 30 filing, the Department reiterated its recommendation as to the future maximum amount of GL and EIL insurance that Enbridge itself provides, through its own affiliates, for the $100 million in required minimums for GL and EIL insurance.[23] The Department used hard numbers ($50 million for GL) and ($5 million) for EIL which, upon reflection, should have used the percentage of 5 percent which was the calculation used to arrive at such numbers.[24]

An important purpose of the insurance requirements is that if, in the future, Enbridge and Enbridge Inc. are not financially healthy, insurance coverage for damages from crude oil spills may be available from independent insurers. That purpose would be subverted if Enbridge were

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[19] *Id.* at 5, 10, 23.
[20] *See* Ex. DER-5, DD-1 at 27 (Dybdahl Direct).
[21] DOC DER July 30 filing at 28–29. *Also compare* Enbridge July 16 Filing, Public Attachment 5A at 4 (Table I) (citing page 170 of Mr. Dybdahl's trial testimony, Evid. Hearing Tr. Vol. 8B (November 14, 2017) at 170 (Dybdahl)) *with* Ex. DER-5 at 4, 15–16, 22 (Dybdahl Direct), Evid. Hearing Tr. Vol. 8B (November 14, 2017) at 113–114, 159, 163, 170–72 (Dybdahl) and DOC DER Initial Br. at 165, 192.
[22] Department's July 30 filing at 28-29.
[23] *Id.* at 29.
[24] The Department's $100 million maximums for the amount of GL and EIL insurance Enbridge may provide itself can be seen to have been based on there being no more than 5 percent of the then-present total GL insurance procured by Enbridge ($940 million X 0.05 = $50 million). Similarly, 5 percent of the future $100 million in EIL and in GL is: $100 million X 0.05 = $5 million.

allowed to provide up to 50 percent ($50 million out of the required $100 million minimum) of its GL requirement through insurance underwritten by its own insurance subsidiaries.

G. Summary of Insurance Recommendations

In Summary, for convenience of the Commission and parties, DOC DER relies on Staff Briefing Papers dated September 11, 2018, regarding DOC DER's insurance-related recommendations and provides below, in legislative format (underline/strike-out), DOC DER's recommended changes to language noted on pages 16–17 of Staff Briefing Papers:

General Liability and Environmental Impairment Liability Insurance

DOC DER recommends ~~recommended~~ that the Commission ~~not~~ approve the July 16 Compliance Filing related to general liability (GL) and environmental impairment liability (EIL) insurance as modified by the following DOC DER recommendations: ~~and requested an opportunity to provide supplemental recommendations at a later date once it has had an opportunity to review documents received from Enbridge on July 25 and 26, 2018, related to an insurance associated discovery by DOC DER.~~:

- ~~Recommended that~~ With regard to insurance availability, the phrase "market availability of insurance on commercially reasonable terms" should be modified to mean "the type of insurance and terms that are available to pipelines generally in the marketplace; that insurance and its terms should be deemed to be terms that are commercially reasonable for the coverage available to pipelines generally in the marketplace and not just to Enbridge."

- ~~Recommended that~~ The Commission should only conclude that minimum coverages of GL and EIL insurance are unavailable to Enbridge upon Enbridge demonstrating that insurance coverage is unavailable to its peer group of pipeline companies as benchmarked by an international insurance brokerage firm with experience in insuring a threshold number of pipeline companies.

- **[DOC DER November CLARIFICATION]** ~~Recommended that~~ The Commission require that carriers affiliated with any Enbridge entity may provide insurance coverage only up to $50,000,000 for GL assuming the present $940 million in total GL coverage or 5 percent of the $100 million minimums for both GL and EIL insurance, such that 5 percent of the $100 million minimum would be ~~and~~ up to $5,000,000 for GL and EIL insurance.

- ~~Recommended that~~ The Commission allow Enbridge to use its GL aggregate coverage to cover Line 3, as the Company presently intends to do, or choose to provide a reinstatement of a limits policy that would need only cover Line 3, and

require Enbridge purchase an annual EIL policy with aggregate coverage of $200 million.

- ~~Recommended that~~ Enbridge be required to increase the amount of its insurance in the event that total available funding from the Oil Spill Liability Trust Fund (OSLTF) falls below $1 billion so as to maintain a total of $1.2 billion (with insurance) to be available in the event of a spill on Line 3.
  ~~DOC DER subsequently filed Supplemental Recommendations on August 10, 2018 based on its review of Enbridge's current insurance policies for its U.S. Mainline System. DOC DER observed that Enbridge's current insurance included significant exclusions for coverage related to oil spill damages, and thus was not consistent with DOC DER's insurance recommendations. In light of this, DOC DER recommended that:~~

- **[DOC DER November CLARIFICATION**] Enbridge make a revised insurance filing consistent with DOC DER's July 30 recommendations. The GL insurance policies should provide clear and unambiguous coverage for damages arising out of oil spills, and not include requirements that would be impractical or impossible to implement. The DOC DER clarified that the $50 million GL self-insurance limitation assumes that Enbridge maintains its GL umbrella coverage of $940 million for its total operations.

- Enbridge be required to annually file a full copy of the lead GL and EIL insurance policies and endorsements applicable to Line 3, including any policies and restrictive endorsements that may diminish coverage for crude oil spills in any way including by other insurance carriers within the coverage stack.

- Enbridge must include Minnesota tribes as additional insureds on the policies.

- Enbridge be prohibited from commencing construction of the Line 3 Project until the Commission has reviewed and approved its revised insurance filing.

- In light of Enbridge's September 10 filing, DOC DER agrees that Enbridge's current Canadian umbrella liability insurance policy may provide coverage for damages from crude oil spills in the United States that are excluded under its U.S. umbrella policy.

- As to a future Line 3, that Enbridge must demonstrate through analysis of clear and unambiguous policy language its compliance with the required coverage under all then-effective insurance policies. This means that it is Enbridge's burden to show that one or more policies provide the required insurance and to show that language of other policies does not diminish or eliminate coverage so claimed to exist by Enbridge.

5. Landowner Choice Program

DOC DER continues to support its recommendations regarding the Landowner Choice Program outlined in its July 30, 2018 comments that reflect the Department's understanding of the Commission's expectations for Enbridge to address: (1) That landowners have access to high quality, unbiased information regarding the tradeoff between removing the existing Line 3 and abandonment-in-place; and (2) That Enbridge's process for assessing the technical and regulatory feasibility of removing the existing pipeline should be transparent. DOC DER's recommendation are listed in the Staff Briefing papers at 12–14 for the Commission's September 11, 2018 hearing and included as Attachment B for convenience.

6. Condition Enforceability

It is imperative that public welfare be protected by ensuring that the Commission's conditions to the CN are enforceable. For example, certain edits discussed above to the Parental Guaranty discuss how ambiguity can be clarified regarding enforceability in Minnesota courts. Further, DOC DER included recommendations to ensure enforceability of the Landowner Choice and Insurance-related modifications on pages 15 and footnote 2, 17, and 34-36 of its response to Enbridge's July 16 filing. The modifications or conditions identified in the Commission's Order are integral to the Commission's approval of the CN for the proposed Line 3 project. Those conditions, therefore, must be implemented by Enbridge and must be enforceable by the Commission. Any failure of Enbridge to provide its commitment to comply or to actually comply with the conditions to the CN would undermine the Commission and the integrity of the CN process.

Sincerely,

/s/ **Peter E. Madsen**

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Enclosures

		Department of Commerce Recommendation[1]	Enbridge 09/07/18 Draft
1.	**Who benefits from the Guaranty?**	DOC recommends that (1) "Beneficiaries" expressly include all heirs, successors, assigns, representatives and personal representatives of the initial Beneficiaries and (2) the Guaranty allows Beneficiaries to freely assign their rights under the Guaranty without requiring consent of the Parent, in light of the length of the Project and transitions in land ownership that will occur over time.[2]	Beneficiaries includes those damaged by an Occurrence, with no express reference to heirs, assigns, etc. No permitted assignment by Beneficiaries without Parent's consent.
2.	**What is covered by the Guaranty?**	DOC recommends that the Guaranty more clearly protect Beneficiaries from all harmful actions (including, but not limited to, releases of oil) that impact persons or property.[3] DOC also recommends that the Commission require that the Guaranty of performance cover failures or inability of Enbridge Energy to comply with state and federal law applicable to the Project, and not just modifications and conditions under the CN or Route Permit: an inability or failure in this respect could result in significant damage to Beneficiaries and are fully within the Parent's control.[4]	The draft contemplates that the Parent will guaranty: (1) amounts that Enbridge Energy is required to pay to a Beneficiary resulting from a release from the Project per a written settlement agreement or final, non-appealable judgment, and Enbridge Energy fails to make such payment; and (2) actions required to remedy a failure or inability of Enbridge Energy to perform modifications or conditions under the CN or Route Permit, per a final, non-appealable order or judgment of the Commission or other applicable federal or state authorities or courts.
3.	**When can a claim be made under the Guaranty?**	DOC recommends that the Guaranty permit action against the Parent without requiring that the Beneficiaries first exhaust all rights against Enbridge Energy. This approach is desirable because (a) the Parent controls Enbridge Energy and will realize direct benefits from the Project, (b) to require exhaustion of rights and remedies first against Enbridge Energy could be costly, time consuming and could be required even under circumstances in which all parties are aware that Enbridge Energy lacks the resources to fulfill its obligations directly, and (c) the purpose of the Guaranty is to	A claim under the Guaranty may be filed only after Enbridge Energy defaults in its obligations and applicable damages and/or default are determined by a final, non-appealable judgment or written settlement agreement.

[1] All recommendations and references noted herein are to the information contained in the July 30, 2018 Recommendations of the Minnesota Department of Commerce, Division of Energy Resources as to Enbridge's July 16, 2018 Certificate of Need Filing

[2] See recommended revisions to (a) the definition of "Beneficiaries" and (b) the section of the Parent Guaranty titled "Miscellaneous".

[3] See recommended revision to the definition of "Occurrence."

[4] See recommended revision to the definition of "Performance Default."

		Department of Commerce Recommendation[1]	Enbridge 09/07/18 Draft
		provide additional protections and remedies to the Beneficiaries without imposing unreasonable hurdles.	
4.	**Who can make a claim under the Guaranty and how?**	DOC recommends that the Guaranty: (1) not expressly require that all legal and administrative actions to determine Enbridge Energy's obligations name the Parent as a co-party, as this is unnecessary in light of the relationship of the parties and could result in a technical inability of a Beneficiary to assert its rights under the Guaranty; and (2) contain language which clarifies that failure of a Beneficiary (which may include individual property owners, Indian tribes or others who may not be aware of the exact conditions of the Guaranty many years from now) to adhere exactly to the procedure specified for filing a Notice of Demand will not result in a waiver of the rights and remedies intended to be granted under the Guaranty. While a process for asserting claims is valuable, the rights of Beneficiaries should be protected as comprehensively as possible and the Guaranty itself should state that a failure to submit a claim in a specific manner does not impair or prevent a Beneficiary from sharing in the benefit of the Guaranty.[5] This recommendation is in addition to the recommendation noted above regarding the ability of Beneficiaries to bring a claim under the Guaranty without first waiting for Enbridge Energy to fail to perform its payment or performance obligations pursuant to a written settlement agreement or final, non-appealable judgment or order.	The draft Guaranty sets forth specific requirements for a Notice of Demand to be made after a payment or performance default by Enbridge Energy, including a specific statement and mailing requirements. The draft Guaranty also requires that the Parent be named in any action to determine obligations of Enbridge Energy.
5.	**What assurances of enforceability and waivers are provided by the Parent?**	In light of the direct relationship between the Parent and Enbridge Energy and the benefits afforded the Enbridge family as a result of the Project, as well as the Commission's requirement that the Guaranty is a necessary component of the Project, DOC recommends that the Parent waive all defenses (other than payment or performance in full of the underlying obligations) in order to prevent costly and time consuming litigation or	The draft waives certain defenses (e.g., lack of authority, bankruptcy of Enbridge Energy, indefiniteness of time period of the Guaranty), but fails to provide clear, direct assurances regarding the Parent's direct economic benefit from the Guaranty, its financial viability after providing the Guaranty,

[5] See recommended revisions to "Notice of Demand" and the section of the Parent Guaranty titled "Demands and Notice."

		Department of Commerce Recommendation[1]	Enbridge 09/07/18 Draft
		administrative proceedings merely to establish the Parent's liability under a Guaranty of the obligations of its affiliate and from a transaction from which it will receive significant direct economic benefits.[6]	and its knowledge and control of Enbridge Energy's operations.
6.	**What happens if the Guarantor's financial condition deteriorates?**	DOC recommends including a framework which would empower the State to require the Parent to provide collateral security for its obligations under the Guaranty should the Parent's financial condition deteriorate to ensure that the financial wherewithal and support offered by the Parent is not so impaired as to render the Guaranty of little value to the Beneficiaries.[7]	Not addressed in Enbridge's 09/07/18 draft.

[6] See recommended expansions to the sections of the Parent Guaranty titled "Nature of Guaranty," "Consents, Waivers and Renewals" and "Representations and Warranties" and the recommended new section titled "Subrogation."
[7] See recommended new section the Parent Guaranty titled "Covenants."

- DOC DER recommended the addition of language to Section 7 of the guaranty requiring Enbridge to explicitly agree and recognize that the term of the guaranty is at least for the life of the Line 3 Project.

- DOC DER recommended modifications to Section 7 of the guaranty to include what it believes to be common and standard waiver language for guaranties of this type.

- DOC DER recommended modifications to Section 10 of the guaranty to include periodic financial reporting of its financial viability.

- DOC DER recommended modifying the guaranty at Section 11 to make clear that Enbridge, Inc., as guarantor, can only succeed to the interests of the obligor, Enbridge Energy, Limited Partnership, if Enbridge Energy, Limited Partnership meets all its outstanding obligations.

- DOC DER recommended modifications for clarity and simplification of claims process in sections 1, 2, and 8 of the guaranty.

Because the DOC DER believes the value of the guaranty is wholly based on the long-term financial strength of Enbridge, it recommended alternatives to the parental guaranty in the form of either a performance bond, a letter of credit, or a trust agreement. DOC DER believes these mechanisms may better insulate the state from risk than relying on a parental guaranty.

Staff notes that these recommended alternatives to the parental guaranty were not items that the Commission ordered Enbridge to detail in the July 16 Compliance Filing.

2. Landowner Choice Program

- DOC DER recommended that the Commission require the independent liaison coordinate directly with landowners along the existing Line 3 instead of acting as a liaison solely between Enbridge and the Commission and permitting agencies.[3]

Staff notes that Enbridge recommended DOC EERA to act as the independent liaison.

[3] This recommendation appears to be repeated in DOC DER's recommendations in sections B.1.a and B.1.b.iii.

- DOC DER recommended that the Commission require Enbridge to submit a detailed plan identifying the specifics of selecting the independent liaison and engineer; process development proposal, and process for implementation.

- DOC DER recommended that the Commission, rather than PHMSA, issue a request for proposal for the third-party engineer. DOC DER also recommended that the Commission administer the contract and oversee the third-party engineer and Enbridge pay the costs of the engineer and contract administration.

Staff notes that Enbridge has agreed to pay the costs of the engineer and the administrative fees to acquire the engineer.

- DOC DER recommended that the third-party engineer coordinate all activities with PHMSA, Minnesota Office of Pipeline Safety (MNOPS), US Army Corps of Engineers (USACE), DNR, MPCA, and Board of Water and Soil Resources (BWSR), and independent consultants. Examples of such coordination would include development of environmental controls during removal and restoration. DOC DER also recommended that Enbridge develop a standard checklist for evaluating the technical and regulatory feasibility of removing the pipeline when landowners request such action.

- DOC DER recommended that Enbridge include a specific calendar date when the Landowner Choice Program would be complete.

- DOC DER recommended that the Commission require Enbridge to include a dispute resolution process whereby unresolved differences between Enbridge and a landowner would be brought to the Commission.

- DOC DER recommended that the Commission require that Enbridge comply with the following five milestones: Providing Notice/Communication to Landowners; Obtaining Landowner Participation; Obtaining Necessary Permits; Effecting Removal and Restoration; and Compensation.[4] In addition, DOC DER recommended that Enbridge be required to file a report with the Commission two times per year detailing its efforts to accomplish each milestone.

[4] The five milestones are identified on pages 16 and 17 of DOC DER's comments and recommendations. Each milestone has detailed sub-requirements.

- DOC DER recommended that Enbridge be required to follow any remedies ordered by the Commission should it fail to perform its commitments and obligations.

- DOC DER recommended that the language in Attachment 2A, pp. 2-3 of the July 16 Compliance Filing be removed because subsequent landowners should be given a right to participate in the program even if the current landowner chose not to. That is, the Landowner Choice Program should supersede all real estate transactions.

- DOC DER recommended that the word "landowner" should be more clearly defined.

3. Decommissioning Trust Fund

In a letter filed on July 20, 2018, and reiterated in its July 30 Recommendations, DOC DER recommended that the Commission not approve Enbridge's July 16 Compliance Filing as it relates to the decommissioning trust fund until it is revised and:

- Is consistent with, and requires no changes to, existing Minnesota and federal law;
- Includes collections over the expected 50-year life of Line 3 project in Minnesota of at least equal to $1.5 billion (USD), as adjusted for inflation;
- Is not controlled by Enbridge Inc. or any present or future affiliated entity;
- Is established only for the purpose of deactivating, monitoring, and removing the pipeline together with remediation of the soil at the time Line 3 is taken out of service in Minnesota; and
- Includes other provisions as required by the Commission."

a. Enbridge Response to DOC DER Regarding Decommissioning Trust Fund

On July 30, 2018, Enbridge filed a letter in response to DOC DER's initial July 20 comment letter addressing each of the issues raised.

- Enbridge explained that the statement indicating existing Minnesota and federal law may require changes to allow a Line 3 decommissioning trust identical to the Enbridge's National Energy Board ordered trusts for its Canadian pipelines was an effort to point out the material differences between the Canadian pipeline trusts and the Line 3 Project's U.S. trust, such as immunity from creditors' claims, adverse tax consequences and obligations, and increased tariffed tolls.

CERTIFICATE OF SERVICE

I, Sharon Ferguson, hereby certify that I have this day, served copies of the following document on the attached list of persons by electronic filing, certified mail, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

Minnesota Department of Commerce
Public Letter

Docket No. PL9/CN-14-916

Dated this 5th day of November 2018

/s/Sharon Ferguson

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