

**STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION**

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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	OAH 65-2500-32764 MPUC PL-9/CN-14-916
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**PETITION TO OPEN DOCKET FOR
LINE 3 REPLACEMENT PROJECT
ABANDONMENT TRUST FUND**

December 1, 2021

PETITION

Honor the Earth hereby petitions the Minnesota Public Utilities Commission (“Commission”) to promptly open a docket in which to establish an abandonment trust fund for Enbridge Energy, Limited Partnership’s (“Enbridge”) recently completed new Line 3 pipeline, as initially required by the Commission’s January 23, 2019, Order Approving Compliance Filings as Modified, and reissued by its May 1, 2020, Order Granting Certificate of Need as Modified. Honor the Earth notes that nearly three years have passed since the Commission first required that it open a docket for this matter and that Enbridge originally and repeatedly committed to prepare a plan before the start of operation.¹

For the reasons provided below, there is an urgent need for an abandonment trust fund based on a thorough and public investigation of this matter. In particular, Enbridge recently filed a Depreciation Study Update supported by a number of appendices (Attachment A) with the Federal Energy Regulatory Commission (“FERC”) that assumes a 20-year (through 2040) economic life for Enbridge’s Mainline System pipelines, including but not limited to new Line 3. This period is 10 years shorter than the economic life stated by Enbridge during the Commission’s evidentiary hearing and in Enbridge’s earlier depreciation studies. Given this shorter time in which to fully fund an abandonment trust fund and the potential challenges to

¹ Enbridge CN Modifications Compliance Filing, Attachment 3a: Decommissioning Trust Fund (July 16, 2018), eDockets ID No. [20187-144948-04](#), at 3 (“Enbridge will diligently pursue each of these items and is committed to having the Decommissioning Trust established *before* L3R is in-service”)(emphasis added); Enbridge Response to DOC-DER Comments Re: Enbridge Compliance Filing on the Decommissioning Trust Certificate of Need Modification (July 30, 2018), eDockets ID No. [20187-145372-01](#), at 5 (“Enbridge has fully abided by the Commission’s modification through its Compliance Filing and will fully meet this modification by establishing a Decommissioning Trust *before* L3R is placed in service that will fund the complete removal of L3R”) (emphasis added); Certificate of Need Modifications – Update Regarding Compliance Filing (Sept. 7, 2018), eDockets ID No. [20189-146299-02](#), at 4 (explaining that efforts to change some of the trust fund’s details were “not an impediment to establishing a fund *prior to* Line 3 Replacement going into service”) (emphasis added).

such funding once Enbridge begins winding down its operations, the Commission should not wait to act on this matter. It should promptly establish a robust and secure funding mechanism as soon as possible to ensure that new Line 3, once abandoned, does not become a financial burden on private as well as state and local government landowners.

The costs of abandoning new Line 3 could be substantial. The Department of Commerce estimated these costs could exceed \$1.5 billion. An abandonment trust fund would ensure that Enbridge and its customers bear the burden of abandonment – not Minnesota landowners. Should the Commission fail to open an abandonment trust fund docket, it would unfairly put landowners and/or taxpayers at risk.

We urge prompt action to fulfill this permit condition and appreciate the Commission's commitment to protect future generations and our environment.

I. A Line 3 Trust Fund Docket Is Timely Because Enbridge Recently Reported to FERC that the Remaining Average Economic Life of its Mainline System in Minnesota Is Just 20 Years.

FERC requires that, once every ten years, each petroleum pipeline company subject to its jurisdiction file a depreciation study that calculates tariff depreciation expenses. 18 C.F.R. § 347.1. Each study must include an estimate of the “average remaining life” of each pipeline system based on both physical and economic factors. 18 C.F.R. § 347.1(e)(4), (5)(viii).

Enbridge's past depreciation studies are available through the FERC eLibrary² for the years 2002, 2003, 2006, and 2016 (2006 and 2016 Studies attached as Attachments B, C). Each of these earlier studies stated that the physical life of the Mainline System could be continually extended through maintenance and refurbishment, such that the Mainline System's “average remaining life” was not limited by physical deterioration. 2006 Study at 4; 2016 Study at 5.

² www.ferc.gov.

Therefore, these studies asserted that the Mainline System’s “average remaining life” is based solely on its remaining economic life, and estimated this to be “over” 30 years based on an expectation that supply and demand for western Canadian crude oil would last significantly longer than 30 years. 2006 Study at 5; 2016 Study at 5-6, 9. Accordingly, these depreciation studies extended the Mainline System’s “truncation” date (end of depreciation period) by 30 years from the date of each study. For example, the 2002 study asserted an average remaining life until 2032, and the 2016 Study (based on 2015 data) until 2045. 2006 study at 4-5; 2016 Study at 2, 5, 9. These studies, therefore, kicked the Mainline System’s truncation date indefinitely into the future.

In a dramatic change in depreciation policy, in May of this year Enbridge filed a 2021 Depreciation Study Update (Attachment A), in which it reduced the expected economic life of the Mainline System to 20 years with a truncation date of 2040. 2021 Study at 2, 4-5. In Appendix A to the 2021 Study, Enbridge calculated that this change in depreciation period would increase the annual depreciation accrual amount by \$74,421,120 per year, from \$394,576,724 to \$468,997,844, or by 19 percent.

Enbridge justified this reduction in average economic life based on:

current and anticipated competition to the Enbridge Mainline, actions by state and local governments and the uncertainty arising from the recent acceleration in the pace of Federal (United States and Canada), state/provincial and local governments passing decarbonization legislation or adopting policies that may influence the market demand for pipelines.

2021 Study at 5. With regard to changes in decarbonization policies, Enbridge specifically referenced:

- President Biden’s Executive Order No. 14008, entitled *Tackling the Climate Crisis at Home and Abroad*³, which contained detailed plans to achieve net zero emissions by 2050; and
- the Canadian federal government’s plan to increase its carbon tax from C\$40/ton to C\$170/ton by 2030. 2021 Study at 5-6, 8.

Enbridge acknowledged that these future risks are uncertain, but nonetheless determined that “use of a December 31, 2040 truncation date . . . is a rational and prudent approach . . .” to managing these risks, because doing so would allow it to charge tariff rates sufficient to ensure recovery of its infrastructure investments before its pipelines become economically obsolete. 2021 Study at 11. In short, Enbridge itself now recognizes that future climate policy development could curtail the average economic life of the Mainline System to 20 years, and that this possibility justifies reducing its depreciation period by a third and substantially increasing the annual depreciation expenses included in its tariffs.

Enbridge’s determination that the average economic life of the Mainline System will be 20 years is a substantial change from Enbridge’s claim in the evidentiary hearing that “[t]he anticipated economic life of [new Line 3] will be no less than 30 years” from its start of operation.⁴ Since Enbridge now estimates the average economic life of its entire Mainline System will be just 20 years, it would also be “rational and prudent” for the Commission to assume that the expected economic life of new Line 3 will also be just 20 years.

The fact that Enbridge sees the possibility of a shortened operational life for the Mainline System, including new Line 3, increases the need for and urgency of an abandonment trust fund

³ Executive Order No. 14008 (“E.O. 14008”), 86 Fed. Reg. 7,619 (Jan. 27, 2021) (E.O. 14008).

⁴ Enbridge Energy Limited Partnership, Application for Certificate of Need for the Line 3 Replacement Project, April 24, 2015, at 8-2 (pdf page 103), available at [20154-109653-03](https://www2.gov.bc.ca/gov2/other/gov2/other/20154-109653-03).

docket. Presumably, the Commission will consider funding such trust fund over time, as is done in Canada. The time in which such funds could be charged is now much shorter than the 30-plus year operational life originally claimed for new Line 3. The sooner a trust fund is established, the more secure it will be.

II. Given a Mainline System Average Economic Life of 20 Years, Enbridge's Financial Capacity Will Likely Decrease More Rapidly Than Expected, Making Abandonment Funding and Local Tax Revenue Less Secure, Particularly in Out Years.

The Commission should not assume that Enbridge's financial capacity will remain constant over the next 20 years. Enbridge's 2040 truncation date is based on an expectation that a number of factors, including climate policy developments, could result in little to no need for crude oil transportation services from western Canada to the U.S by 2040. The unstated reasoning here is that a large proportion of western Canadian crude oil production will become uneconomic and/or regulatorily prohibited, with the result that Enbridge's customer base, revenues, and return on investment will over time shrink. Given the 2040 truncation date, the Commission should anticipate that Enbridge's revenues will begin a terminal decline later this decade. Thus, the sooner the Commission establishes a Line 3 abandonment trust fund, the more likely that Enbridge and, via tariffs, its customers will be able to fund this trust. It would be reasonable and prudent for the Commission to front load Enbridge's funding obligation.

As Enbridge's future revenues and profits decrease, the State of Minnesota and the northern counties through which the Mainline System passes should also anticipate that Enbridge's property tax payments will decrease proportionally, leaving them less financially able to remediate abandonment costs in the event Enbridge fails to fully fund a trust fund. This is so because the recent state court decisions related to Enbridge's claims for property tax refunds held that Enbridge's assessed property tax value should be based primarily on the income earning

potential of its property rather than the “cost” (book value) of its pipeline assets. Minnesota Tax Court Memorandum in Support of Amended Findings of Fact, Conclusions of Law, and Order (March 9, 2021), at 13-14, 21, in *Enbridge Energy, Limited Partnership v. Commissioner of Revenue*, Docket Nos. 8579-R, 8631-R, 8771-R. (“Amended Tax Findings” included as Attachment D). The Tax Court found that the assessed value of Enbridge’s property should be 80 percent based on its income earning potential and 20 percent on its cost, rather than the default 50/50 weighting specified in Minn. R. 8100.0300, subp. 5. *Id.* at 21. Thus, as Enbridge’s future income declines, its property tax payments should also be expected to decline.

In making its decision to weigh Enbridge’s profitability so heavily, the Tax Court relied on arguments by Enbridge that the Mainline System was less profitable because it suffered from “external obsolescence,” meaning that external factors outside of Enbridge’s control reduced its profitability. Amended Tax Findings at 11, 20. External obsolescence is defined as “a temporary or permanent impairment of the utility or salability of an improvement or property due to negative influences outside the property.”⁵ Such external factors include adverse market conditions, actions of regulators, market competition, and third-party actions that reduce profitability. The property tax concept of “external obsolescence” is related to the concept of “economic life” used to define depreciation period, in that a property’s economic life ends when it becomes completely obsolescent.⁶ Essentially, Enbridge’s 2021 Depreciation Study asserts that the 2040 truncation date is reasonable because the Mainline System may become obsolescent by then due to external factors including competition from other transportation providers; actions by regulators related to particular pipelines; and climate change policy developments that adversely impact the petroleum markets served by the Mainline System.

⁵ Appraisal Institute, *The Appraisal of Real Estate*, 14th Edition (2013) at 576.

⁶ See *id.* at 598-605.

The northern counties, cities, and towns through which new Line 3 and other Mainline System pipelines pass should anticipate reduced property tax revenues as demand for Enbridge's services declines, Enbridge's income drops, and it begins sequentially abandoning its pipelines. The local governments currently dependent on Enbridge tax payments will likely experience reduced property tax revenues just as costs related to pipeline abandonment increase. Given a likely decline in crude oil transportation starting well before the 2040 truncation date, these governmental entities should anticipate that Mainline System property tax payments will begin to decline much sooner than might currently be expected. One way they might begin preparing for this challenging situation is through participation in an abandonment trust fund docket to ensure that they avoid paying abandoned pipeline mitigation costs. Although the Commission can do nothing to stop Enbridge's inevitable decline, it can help reduce the financial risks faced by state and local governments through opening a Line 3 abandonment trust fund docket.

III. Absent Commission Establishment of a New Line 3 Abandonment Trust Fund, Enbridge Cannot Include the Costs of Such Fund in its FERC Tariffs.

FERC regulates interstate crude oil pipeline Asset Retirement Obligations ("ARO") under 18 C.F.R. § 346.3 and 18 C.F.R. Part 352, General Instruction 1-19 ("GI 1-19"). GI 1-19(a) states:

An asset retirement obligation represents a liability for the legal obligation associated with the retirement of a tangible long-lived asset that a utility is required to settle as a result of an existing or enacted law, statute, ordinance, or written or oral contract or by legal construction of a contract under the doctrine of promissory estoppel. An asset retirement cost represents the amount capitalized when the liability is recognized for the long-lived asset that gives rise to the legal obligation.

(Emphasis added.) That is, pipeline companies may not include an ARO in FERC reporting and tariffs absent a statutory, regulatory, or contractual requirement that creates such obligation.

Once an ARO is required, GI 1-19(b) directs that it be reported as a liability in “Account 67” (Asset Retirement Obligations), which is one of the standard accounts used by pipeline companies in financial reporting to FERC via Forms 6 and 6Q.

Enbridge first reported an ARO liability in its 2014 Q1 Form 6, which states that Account 67 then totaled \$100.6 million, of which \$60.2 million was related to Line 6B in Michigan and \$40.4 million to Line 3, presumably meaning old Line 3. Enbridge does not identify the source of the requirement to establish an ARO for old Line 3, but since this obligation was established before Enbridge filed its Certificate of Need Application with the Commission, it may have done so pursuant to a contractual obligation with its customers. At present, Enbridge’s most recent Form 6Q (2021 Q2) states an ARO liability for its Mainline System of \$219,717,831, but Enbridge did not include detail in this form about which of its pipelines these funds cover, though this amount may include Landowner Choice Program obligations. Since the Commission has not yet required that Enbridge pay a specific amount into an abandonment trust fund for new Line 3, it seems unlikely that Enbridge has included new Line 3 abandonment costs in its ARO account.

With regard to cost recovery for ARO obligations, Enbridge’s 2021 Study states that ARO’s in conjunction with the Line 3 Replacement Project are included in its Facilities Surcharge to its Mainline System FERC tariff base rate, 2021 Study at 2, meaning that Enbridge would recover its old and new Line 3 ARO costs via this FERC tariff surcharge. Since the Commission has not yet established a trust fund for new Line 3’s eventual retirement, it is not possible for Enbridge to quantify this liability and create an ARO for new Line 3, much less fund this liability through its tariffs.

The foregoing FERC regulations make clear that absent action by the Commission (or some other regulator), Enbridge will not and may not collect funds to pay for the eventual retirement of new Line 3, or for that matter any of its other pipelines, via its tariffs. Thus, Commission action to require an abandonment trust fund is needed to ensure that the fund can be financed through Enbridge's tariffs.

Given (a) the combined ARO for Lines 6B and 3 was \$100 million in 2014; (b) the subsequent creation of the Landowner Choice Program; and (c) the lack of any general pipeline retirement funding requirement in Minnesota statutes, the laws of other states, or U.S. federal law; it seems likely that the Mainline System's current \$219 million ARO liability is intended to pay for retirement of only Line 6B and old Line 3. That is, Enbridge likely has not funded the abandonment costs for any of its other Mainline System pipelines in Minnesota, including new Line 3 or Lines 1, 2, 4, 65, and 67; nor has it funded the abandonment costs of currently operating pipelines in other states including Lines 5, 6, 14/64, 61, 62 and 78. Should ARO's be required by other states for Enbridge's out-of-state pipelines, Enbridge's total abandonment liability for its Mainline System pipelines could increase dramatically, making early action by the Commission imperative.

IV. The Government of Canada's Decision to establish an Abandonment Trust Fund for Enbridge's Pipelines Totaling C\$ 1.7 Billion Is Evidence of Both the Need for and the Potential Scale of an Abandonment Trust Fund.

In an effort to protect Canadian landowners and taxpayers from future pipeline abandonment costs, the Canadian government required Enbridge to pay C\$1.743 billion into an independently managed abandonment trust fund over a period 40 years.⁷ The Canadian Energy

⁷ Canadian Energy Regulator Pipeline Profiles: Enbridge Mainline, <https://www.cer-rec.gc.ca/en/data-analysis/facilities-we-regulate/pipeline-profiles/oil-and-liquids/pipeline-profiles-enbridge-mainline.html#abandonment>. Since the Canadian trust fund's growth is premised on the assumption of 40 years of payments, it could be underfunded given the 2040 truncation date.

Regulator page for the Mainline System states that through 2019 Enbridge paid C\$226,100,000 into this trust,⁸ and a 2020 audit of the trust stated it contained C\$315,809,000.⁹

Since the U.S. federal government has not established a nation-wide pipeline abandonment trust fund, it is incumbent on U.S. states and tribes to do so. By initiating an abandonment trust fund docket, the Commission will take a critical trailblazing step toward ensuring that the pipeline industry does not inflict pipeline abandonment costs on landowners and taxpayers.

CONCLUSION

For the foregoing reasons, Honor the Earth hereby petitions the Commission to expeditiously initiate a new docket in which to assess the amount and structure of an abandonment trust fund for the new Line 3 pipeline, as required by the Certificate of Need approved by the Commission for this pipeline.

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Respectfully submitted,

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⁸ *Id.*

⁹ PriceWaterhouseCoopers, LLC, Abandonment Trust Financial Statements (2020) at 5, available at: <https://www.enbridge.com/~media/Enb/Documents/Public%20Awareness/Abandonment%20Trusts/2020%20Enbridge%20Pipelines%20Inc%20Abandonment%20Trust%20Financial%20Statements.pdf?la=en>.