

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

ISSUE DATE: November 4, 2022

DOCKET NO. PL-9/CN-21-823

ORDER DIRECTING ENBRIDGE TO
DRAFT TRUST AGREEMENT FOR
NOTICE AND COMMENT

PROCEDURAL HISTORY

On June 28, 2018, in a separate docket, the Commission met and voted to grant to Enbridge Energy, Limited Partnership (Enbridge) a certificate of need to build a petroleum pipeline extending from North Dakota to Wisconsin to replace the aging Line 3 pipeline.¹ The new pipeline would cross through reservation lands of the Fond du Lac Band of Lake Superior Chippewa, and through the ceded lands of other tribal governments. As one condition for granting the certificate of need, the Commission directed Enbridge to establish a trust fund to pay for the cost of decommissioning the new pipeline—now called Line 93—when it reaches the end of its useful life. Specifically, the Commission directed Enbridge to propose terms for the Decommissioning Trust Fund based on an analogous fund Enbridge was creating to decommission its pipelines in Canada.

On July 16, 2018, Enbridge filed proposed terms for the Decommissioning Trust Fund.

On July 20 and 30, 2018, the Minnesota Department of Commerce (Department) filed comments opposing Enbridge's proposed terms and recommending changes.

On September 7, 2018, Enbridge filed revised terms for its Decommissioning Trust Fund, as well as a discussion regarding the process of developing these terms.

¹ *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*, Docket No. PL-9/CN-14-916, Order Granting Certificate of Need as Modified and Requiring Filings (September 5, 2018); re-issued in same docket, Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need as Modified, and Granting Routing Permit as Modified (May 1, 2020).

On September 11, 2018, the Commission met to consider Enbridge's July 16 filing and the parties' comments and took no action.

October 16, 2018, Enbridge further revised its proposed terms for the trust fund.

On November 5, 2018, the Department filed a letter stating grounds for opposing Enbridge's proposal.

On January 23, 2019, the Commission issued an order that A) accepted Enbridge's various filings as complying with the Commission's orders, B) authorizing a new docket for establishing the terms of the Decommissioning Trust Fund, C) directed Enbridge to consult with the Department on its proposed revisions, and D) directed Enbridge to evaluate modeling the trust fund on examples promulgated by the federal Environmental Protection Agency, the federal Bureau of Land Management rules, and the Canadian National Energy Board's provisions.

On December 1, 2021, Honor the Earth filed a petition to initiate proceedings in the current docket.

By July 20, 2022, the Commission had received initial, reply, and/or supplemental comments from –

- the Department,
- Enbridge,
- Friends of the Headwaters,
- Honor the Earth,
- Public Employees for Environmental Responsibility,

and various members of the public.

On September 9, 2022, the Department filed a letter stating that it had retained a consultant to assist with issues relating to establishing and operating a trust.

On September 22, 2022, the Commission met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Enbridge's Proposal

It is filings, Enbridge outlined a proposed trust agreement. Enbridge estimated that it would need to collect \$1.2 billion.

Enbridge argued that its proposed framework and terms were consistent with the requirements of the Canada Energy Regulator, but noted that the trustee may seek to refine the trust's terms to conform to the trustee's own constraints.

Enbridge's outline included a proposal to make South Dakota the situs of the trust in order to benefit from that state's advantageous trust laws. For the trustee, Enbridge proposed to select a U.S. domestic financial corporation not affiliated with Enbridge. For the beneficiary, Enbridge proposed to designate a person, persons, or entity given the obligation to decommission the pipeline—or, alternatively, the Commission's designee. Enbridge noted that South Dakota law does not require the designation of a specific person or entity as the beneficiary; rather, the state permits the trustee to distribute funds to achieve a designated purpose.

Enbridge proposed that the trust be managed by a U.S. domestic entity—likely an affiliate of a corporate trustee—and that the trustee or investment advisor draft the investing strategy. According to the proposal, each year the trustee would give Enbridge a report on the status of the trust account, and Enbridge would file this report with the Commission.

As proposed, the trust could not be altered except by the joint agreement of Enbridge and the trustee—and material modifications would also require Commission approval. Enbridge anticipated that the Commission would review the trust every five years—consistent with the Commission's practice in reviewing decommissioning plans developed for other large energy projects, and with the practice of the Canada Energy Regulator.

In sum, Enbridge asked the Commission to identify the basic terms for the Decommissioning Trust Fund, direct Enbridge to draft the trust documents consistent with those terms and as negotiated with the trustee, and submit them for agency review.

II. Comments

The Commission received comments on various aspects of Enbridge's proposal, including the following:

A. Trust Models

Commenters offered a variety of possible models for creating the trust agreement. Examples included documents approved by the Canada Energy Regulator, the U.S. Bureau of Land Management guidelines, or the U.S. Environmental Protection Agency. Other commenters recommended drafting the trust based on decommissioning plans established for other large energy infrastructure projects permitted by the Commission—for example, wind farms, solar projects, and transmission lines.

B. Beneficiary and Trustee

Various commenters recommended designating a state entity as the beneficiary. Noting the possibility that Enbridge might no longer exist by the time the pipeline has reached the end of its useful life, the Department noted that a trust established for managing the end of the NorthMet mining project named Minnesota's Department of Natural Resources as the trust beneficiary.

Honor the Earth proposed designating a government entity as the trustee, and designating the beneficiary as any person or entity encumbered with the pipeline facility. As an initial matter, Enbridge could request the trustee to release funds to decommission the pipeline—but if this did

not occur, a state agency, local units of governments, or private landowners could also request decommissioning funds from the trustee.

C. Decommissioning Cost Estimate

Friends of the Headwaters recommended requiring Enbridge to file an estimate of its decommissioning costs with sufficient detail to permit commenters to evaluate the calculation. The Department recommended directing Enbridge to have an independent auditor review the decommissioning cost estimate. In response, Enbridge proposed that the independent third-party engineer retained by the Department could review the cost estimates.

The Department also recommended that the Commission review the fund every three years rather than every five years as Enbridge had proposed.

D. Procedural Matters

Honor the Earth and certain landowners argued that this docket had failed to provide adequate notice and opportunity for landowners to comment on the Decommissioning Trust Fund proposals, and therefore asked for additional process.

In addition, Honor the Earth and other landowners asked the Commission to further develop the factual record by referring this matter for a contested case proceeding. Enbridge opposed this proposal, arguing that the commenters had not articulated the appropriate legal standard for referring the matter, or even explained the factual questions to be resolved.

III. Commission Action

Having considered the filings and arguments of all commenters, the Commission finds that it is appropriate for Enbridge to develop proposed Decommissioning Trust Fund documents in a manner that fulfills the procedural and substantive requirements set forth below. Rather than seeking additional comments or referring the matter for contested case proceedings at this stage, the Commission will direct Enbridge to offer a more detailed proposal.

Procedurally, the Commission will direct Enbridge to draft Decommissioning Trust Fund documents, and to file those documents within two months for public comment and Commission approval.

As an initial step, the Commission will direct Enbridge to consult with the Fond du Lac Band of Lake Superior Chippewa and other affected tribal governments, as well as the Department. This step will help ensure that Enbridge is fully aware of these stakeholders' concerns as it prepares those documents.

Substantively, the Commission will direct Enbridge to include in its draft the following components:

First, Enbridge must include an estimate, reviewed by an independent expert, of the cost for the total contribution amount to be included in the trust; Enbridge must also include documents

supporting its analysis. If Enbridge cannot achieve this within two months, it must offer a proposal and timeframe for the independent review of the cost estimate.

Second, Enbridge must state its proposed monthly contribution amount; again, Enbridge must also include documents supporting its analysis.

Third, Enbridge must state its proposed initial contribution amount to be made upon establishment of the trust.

Fourth, Enbridge must identify who or what entities should be the beneficiary of the trust.

Fifth, Enbridge must propose a trustee, and explain its process for selecting that trustee.

Sixth, Enbridge must propose procedures for modifying the terms of the trust, and for ensuring regular Commission review of the trust. Enbridge must also describe the policy it would use for investing the trust fund.

Seventh, Enbridge must discuss its choice to designate South Dakota as the situs and choice of law for the draft trust. This discussion must compare application of Minnesota and South Dakota law, and how the trust language would maintain Minnesota as the venue for any judicial actions regarding the trust. Finally, Enbridge must identify any differences between its proposal, the trust requirements of the Canada Energy Regulator, and the trust requirements under Minnesota Pollution Control Agency rules,² and must explain the reasons for these differences.

This information will provide the necessary foundation for establishing the Decommissioning Trust Fund.

ORDER

1. The Commission directs Enbridge Energy, Limited Partnership, within two months and after coordinating with the Minnesota Department of Commerce, the Fond du Lac Band of Lake Superior Chippewa, and other affected tribal governments, to file a draft trust agreement for notice and comment, including the following:
 - A. An independently reviewed cost estimate for the total contribution amount to be included in the trust, and supporting documents—or, if not, a proposal and timeframe for the independent review of the cost estimate.
 - B. A proposed monthly contribution amount and supporting documents.
 - C. A proposed initial contribution amount to be made upon establishment of the trust.
 - D. An identification of who or what entities should be the beneficiary.

² See Minn. R. ch. 7035.2805.

- E. A proposed trustee and information explaining the process used to select the proposed trustee.
 - F. Provisions that address modifications to the terms of the trust, regular Commission review, and an investment policy.
 - G. An explanation of Enbridge's choice to designate South Dakota as the situs for the trust and choice of law for the draft trust—providing a thorough discussion comparing application of Minnesota and South Dakota law, and how to maintain Minnesota as the venue for any judicial actions regarding the trust.
 - H. A list of the differences between Enbridge's proposal, the requirements of the Canada Energy Regulator, and the trust requirements under Minnesota Pollution Control Agency rules (Minn. R. ch. 7035.2805)—and the reasons for the differences.
2. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Will Seuffert
Executive Secretary



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