STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION

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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**

SUPPLEMENTAL COMMENTS OF FRIENDS OF THE HEADWATERS IN RESPONSE TO ENBRIDGE REPLY COMMENTS

I. INTRODUCTION

Friends of the Headwaters (FOH) submits these supplemental comments to respond to the Reply Comments and attachments Enbridge filed on April 12, 2023.

First, FOH appreciates that there has been some progress, at least some agreement in principle. Enbridge touts its natural gas and renewable energy businesses, in addition to its crude oil pipelines,[1] which presumably means that Enbridge agrees that the assets of all of those different companies and enterprises are now and will always be available to pay for decommissioning costs or any other liabilities associated with Line 93.[2] Enbridge further acknowledges that protecting Trust assets from other Enbridge creditors is critical,[3] and now apparently agrees that, as a result, it cannot be *Enbridge* with the authority to direct distributions

[1] Enbridge Reply Comments, at 13.
[2] If Enbridge is not making that commitment, then, of course, the assets or value of the other Enbridge entities are wholly irrelevant. Even if Enbridge is making that commitment today, however, on that future date when the liabilities associated with Line 93 begin to look like they may exceed its revenue potential, Enbridge may change its tune. At that point, Enbridge will try to insulate those other assets as best it can. Its shareholders and creditors will demand no less. So, while FOH appreciates Enbridge's apparent willingness today to open those assets up to Line 93 liabilities, it has not yet seen the language that would make that a reality when the pressure is on.
[3] Enbridge Reply Comments at 1.

from the Trust.[4] Enbridge also apparently agrees that a central goal is to have adequate funds available to pay for third parties to do the decommissioning work, even if Enbridge is no longer in the picture, unable or unwilling to discharge its obligations.[5]

There remain, however, significant disagreements over several key issues:

II. STRUCTURE OF THE TRUST

As FOH reads Enbridge's proposed revised agreement, there would no longer be any circumstances where Enbridge or any Enbridge entity could direct the distribution of Trust assets. That is significant progress. Enbridge still, however, insists that it be designated as a Beneficiary of the Trust, and that creates an unnecessary ambiguity. Trustees are fiduciaries, but that begs the question of to whom do they owe that fiduciary responsibility. Normally trustees owe their fiduciary duty to the beneficiaries, so designating Enbridge as a beneficiary only increases the risk that either (1) Enbridge could successfully claim an entitlement to that money; and (2) other Enbridge creditors could plausibly argue that Enbridge has effective control of the funds.

As FOH explained in its reply comments, that does not mean that the Trustee could not distribute funds to Enbridge to cover decommissioning costs, if Enbridge incurs those costs and has a legitimate claim for reimbursement. Enbridge does not have to be a beneficiary for that to be a possibility, however. One would hope that, in the normal course, Enbridge would indeed discharge its decommissioning obligations as required by its Certificate of Need, and then get reimbursement from the Trust Fund. There is no need for Enbridge to be a beneficiary for that process to work. And, in a scenario where Enbridge is either out of the picture or embroiled in

[4] Enbridge Reply Comments, Attachment A, para. 5.1(5) & (6), appear to give the "Trust Protector" sole authority to direct the Trustee to distribute Trust assets.
[5] Enbridge Reply Comments at 8.

disputes with its creditors, having Enbridge designated as a beneficiary will only create, not solve, any problems.

The real question is who will have the authority to order the trustee to distribute trust fund assets. Enbridge suggests an outside "Trust Protector," nominated by Enbridge, but ultimately appointed by the Commission,[6] DOC-DER suggests that DOC-DER be the Trust Protector, at least initially, and FOH continues to assert that the State of Minnesota can simply be the designated beneficiary, and decide for itself which agency will perform that responsibility.[7] Enbridge raises some doubt about the statutory authority of any state agency to perform these functions, but, generally speaking, the State often receives funds from the federal government, or from litigation settlements, or from other sources dedicated to particular purposes and is routinely able to see that that money is directed to those purposes without new statutory enactments. In this particular case, DOC-DER has express authority to enforce any PUC order, Minn. Stat. § 216A.07, subd. 2, and the Commission has authority to make grant of a certificate of need contingent on reasonable conditions or modifications, which would include the establishment of a decommissioning trust or other financial assurance mechanism. Minn. Stat. § 216B.243, subd. 5. That gives DOC-DER clear authority to enforce the terms of the Decommissioning Trust ordered by this Commission.

Again, as it stated in its earlier Reply Comments, FOH is not necessarily opposed to a Trust Protector, but FOH does not yet see the value that would add. FOH does believe the best

[6] In paragraph 5.2 of Enbridge's proposed revised agreement (Attachment A at 7), Enbridge refers to an "Enforcer." FOH assumes that Enbridge means the "Trust Protector" referred to in the preceding paragraphs, and not that there be two people or entities responsible for trust distributions.

[7] DNR would be the beneficiary of a trust set up to cover closure and post-closure expenses of a permitted mine, and MPCA is the beneficiary of trusts set up to cover closure and post-closure expenses of waste facilities.

course is to give DOC-DER or its designee the sole authority to decide whether or under what circumstances trust assets will be distributed.

III. CONTRIBUTION SCHEDULE

On this issue, the parties remain far apart. FOH has maintained throughout that no one can know today when Line 93 will need decommissioning, but, whenever that happens, whether it be five years, twenty years, or forty years,[8] it will be necessary that the Decommissioning Trust Fund be 100% funded. Allowing Enbridge to chip in a little each year over a forty-year period will not accomplish that. Indeed, Enbridge's suggested approach all but *guarantees* that the Trust Fund will *not* be fully funded when it is needed. Again, that is why waste facility operators are required to fully fund trusts to cover closure and post-closure costs within at least five years of permitting, even if the facility is expected to continue in operation for several decades.[9]

Enbridge's justifications for its position are not persuasive. First, Enbridge says or implies that it plans to operate Line 93 for at least 40 years, probably 50 or more, so there will be no need for a fully-funded trust until then. Unless the Commission is prepared to make a finding that, in its view, there will be no material reduction in the need or demand for crude oil from western Canada over the next several decades, that there will be no shift away from refined petroleum products for transportation or any other purpose, and that there will be no climate policies adopted, whether they be carrots or sticks, federal or state, that will change that scenario, any conclusion that a 40-year contribution schedule will be sufficient would be irresponsible.

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[8] If we are still relying on crude oil from Canada in forty years, then we will have genuinely failed, and we will be facing a very difficult climate future. This Commission should not make assumptions that are premised on catastrophic policy failure.

[9] 40 C.F.R. § 264.143(a)(3)("Payments into the trust fund must be made annually by the owner or operator over the term of the initial RCRA permit [five years] or over the remaining operating life of the facility as estimated in the closure plan, *whichever period if shorter.*")(emphasis added).

Second, Enbridge complains that DOC-DER long ago agreed that a 40-year contribution schedule would be fine.[10] There never was any such agreement, certainly not on any public record. General references to the abandonment trusts Enbridge has in place in Canada in testimony does not mean that DOC-DER has agreed to, or this Commission is obligated to accept, any specific terms from those Canadian arrangements. Indeed, it is most likely that, at the time, DOC-DER's understanding of the details of the decommissioning trust rules adopted by the National Energy Board, now the Canadian Energy Regulator, was limited, but only knew that Canada had some kind of trust fund mechanism established, and that Enbridge's protestations that this was "unprecedented" were unfounded.

It is true that, back in the early 2010's, what is now the CER did allow Enbridge and the other major pipeline companies extended periods of time to fund their abandonment trusts. The *sole* rationale, however, for those decisions was the projected size of crude oil reserves in the western Canada basin, and there was no acknowledgment of even the possibility of an early abandonment. It may also be possible that Enbridge Mainline shippers would balk at paying the full cost of a more front-loaded contribution schedule. But, frankly, that is Enbridge's problem, not the Commission's. Enbridge has represented that it currently has the wherewithal to pay the costs of remediating a catastrophic oil spill, and that ability is not conditioned on getting the agreement of its shippers.

Third, Enbridge contends that FOH overstates the risk of companies being able to avoid decommissioning costs in bankruptcy through abandonment of property, spin-offs, or otherwise separating net revenue producing properties from properties with little revenue potential but considerable closure or post-closure liabilities.

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[10] Enbridge Reply Comments at 7-8.

If anything, FOH has understated the potential risk. Contrary to Enbridge's assertion, "abandonment" of "non-producing properties" with substantial environmental obligations under 11 U.S.C. § 554 attached is a very real possibility.[11] Indeed, it has become a common practice in the oil and gas industry. *See generally* Nicole Layton & Ginger Sprong, *Cut and Run: Bonding, Bankruptcies, and the Orphaned-Oil-Well Crisis,* 10 LSU J. Energy L. & Resources 1 (2022); Center for International Environmental Law (CIEL), *Toxic Assets: Making Polluters Pay When Wells Run Dry and the Bill Comes Due* at 11-12 (Bankruptcy Loopholes) (2021);Nick Cunningham, *Taxpayers Are Footing the Bill for 100-Year-Old Oil Wells,* OILPRICE.COM (June 21, 2020), https://oilprice.com/Energy/Energy-General/Taxpayers-Are-Footing-The-Bill-For-100-Year-P;d-Oil-Wells.html; Carnisha L. Simmons, *Oil and Gas Decommissioning: At Whose Expense?* 37 APR-Am. Bankr. Inst. J. 38 (2018). Recent cases, again just in the oil and gas industry, where bankruptcy courts allowed debtors to abandon oil and gas properties to avoid decommissioning costs, include *City of Beverly Hills v. Venoco LLC,* 572 B.R. 105, 108 (Bankr. D. Del. 2017) (court approves abandonment of oil and gas well, and two oil pipelines, debtor able to avoid decommissioning costs, shift burden to state and city) and *In re ATP Oil and Gas Corp.,* 2013 WL 3157567 (Bankr. S.D. Tex. 2013) (court allows abandonment of offshore oil and gas platform to permit debtor to avoid decommissioning costs).[12]

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[11] Section 554 provides that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). Even if Enbridge somehow agreed not to abandon Line 93, it would not matter because, under 11 U.S.C. § 554(b), "[o]n request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." In other words, Enbridge creditors would have a right to seek an order *compelling* Enbridge to abandon Line 93 so that Enbridge could not spend money on decommissioning even if it wanted to, leaving more assets available to divide among the other Enbridge creditors.

[12] Contrary to Enbridge's contention, parental guarantees make little or no difference. Parent corporations can divest themselves of nonproducing assets subject to major liabilities just as easily as subsidiaries can. During the coal bankruptcies, parent companies were supposedly on the hook for reclamation responsibilities, but they had little trouble transferring those obligations to insolvent entities or transferring their useful assets to others and leaving themselves insolvent. Enbridge does not address or even acknowledge the reality that, despite parental guarantees like Enbridge's being in place, the burden of reclaiming used-up coal mines now largely rests with the taxpayers.

Take a hypothetical example. It is 2035, twelve years from now, and no new cars or light-duty trucks with internal combustion engines are being sold. Demand for crude oil is dropping, and especially demand for expensive, environmentally damaging heavy crude oil from western Canada. The decommissioning trust for Enbridge Line 93 is 70 to 80% unfunded, because Enbridge has only made about one-fourth of the contributions necessary to fully fund the cost of decommissioning. Enbridge announces that it will no longer contribute to the trust, and that it will not pay for decommissioning Line 93 either. The particular Enbridge entity that owns and operates the pipeline at that point files for bankruptcy, and notices its intent to abandon Line 93. The bankruptcy court agrees, and leaves the State with nothing but a possible general unsecured claim for the decommissioning expenses for which Enbridge no longer has any obligation.

That is not a far-fetched scenario. Indeed, it is a *likely* scenario under the prevailing case law if Line 93 does not remain profitable enough for Enbridge to keep operating at any time before the decommissioning trust is fully funded. Any negotiations that take place at such a time will be against the background of Enbridge likely being able to use the bankruptcy code to walk away from its obligations altogether. The only solution to that problem is to insist on full funding well before any such scenario might arise, precisely the solution Enbridge is now trying to avoid.

IV. CONTRIBUTION AMOUNTS AND REVIEW

Throughout the process, FOH has made three contentions about the trust fund contribution amounts: (a) that the total estimate be based on what it would cost the *State* to plan and do the decommissioning work, not on what it would cost Enbridge; (b) that the cost estimate be reviewed annually, not just every five years, as Enbridge proposes; and (c) that, if the PUC

allows Enbridge to make its contributions over time, that Enbridge not be able to reduce its contribution amounts by employing an inappropriately high discount rate. The WSP report on Enbridge's decommissioning and removal cost estimate, which was made available to the public on April 17, 2023, only reinforces those concerns. The estimate is *not* based on what the State's costs would be, varying inflation rates create a real risk of underfunding during periods between reviews, and that risk of underfunding would be compounded by using a discount rate that is too high.

FOH's position therefore remains that the cost estimate be revised upward to reflect the additional costs that would be incurred if the State were forced to do the decommissioning work, to reflect the State's lack of pipeline expertise and its procurement requirements. FOH further recommends annual reviews of the cost estimate, or at minimum a requirement that the cost estimate be automatically adjusted each year by a construction cost index during the periods between reviews.[13] And FOH again suggests that, if discount rates come into play, the current proposed OMB discount rate for regulatory analysis under Circular 4-A be presumptively be the rate chosen—currently 1.7%.[14]

V. CONCLUSION

While there seems to be some additional agreement in principle, there are still many elements in Enbridge's proposal that can or will defeat the goal of assuring that adequate funds will always be available to decommission and remove Line 93 at the time Line 93 is no longer profitable enough for Enbridge to continue operations. Clarifying that Enbridge is not a

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[13] EPA requires annual adjustments of closure cost estimates, and gives owners or operators the option of recalculating the maximum cost of closure in current dollars "or by using an inflation factor derived from the most recent implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its *Survey of Current Business."* 40 C.F.R. 264.142(b).

[14] Office of Management and Budget (OMB), *Circular A-4—Draft for Public Review* (April 6, 2023), at 74-83, https://www.whiwtehouse.go/wp-content/uploads/2023/04/DraftCircularA-4.pdf

beneficiary of the trust, requiring full funding of the trust either immediately or quickly, and ensuring that construction inflation does not erode the value of the trust over time would do a great deal to ensure that the decommissioning trust does what this Commission intended it to do.

Respectfully submitted,

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DECLARATION OF SERVICE

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

STATE OF MINNESOTA)
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COUNTY OF HENNEPIN)

I, Scott Strand, hereby state that on April 19, 2023, I filed, by electronic eDockets, the attached **Supplemental Comments of Friends of the Headwaters,** and eServed or sent by U.S. Mail, as noted, to all parties on the attached service list.

See attached service list.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

/s/ Scott Strand
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Will	Seuffert	Will.Seuffert@state.mn.us	Public Utilities Commission	121 7th Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_21-823_Official
Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	7400 Lyndale Ave S Ste 190 Richfield, MN 55423	Electronic Service	No	OFF_SL_21-823_Official
Eileen	Shore	eileenshore@outlook.com	Friends of the Headwaters	3137 42nd Ave So Minneapolis, MN 55406	Electronic Service	No	OFF_SL_21-823_Official
Richard	Smith	grizrs615@gmail.com	Friends of the Headwaters	P.O. Box 583 Park Rapids, MN 56470	Electronic Service	No	OFF_SL_21-823_Official
Mollie	Smith	msmith@fredlaw.com	Fredrikson Byron PA	Suite 4000 200 South Sixth Street Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_21-823_Official
Scott	Strand	SStrand@elpc.org	Environmental Law & Policy Center	60 S 6th Street Suite 2800 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_21-823_Official
Eric	Swanson	eswanson@winthrop.com	Winthrop & Weinstine	225 S 6th St Ste 3500 Capella Tower Minneapolis, MN 554024629	Electronic Service	No	OFF_SL_21-823_Official
Christine	Tezak	tezak@cvenergy.com		209 Constitution Avenue, NE Washington, DC 20002	Electronic Service	No	OFF_SL_21-823_Official
Jeremy	Tonet	jeremy.b.tonet@jpmorgan.com		N/A	Electronic Service	No	OFF_SL_21-823_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Jayme	Trusty	execdir@swrdc.org	SWRDC	2401 Broadway Ave #1 Slayton, MN 56172	Electronic Service	No	OFF_SL_21-823_Official
Melissa	Turner	melissa.turner@enbridge.com	Enbridge	7701 France Ave S Edina, MN 55435	Electronic Service	No	OFF_SL_21-823_Official
Jen	Tyler	tyler.jennifer@epa.gov	US Environmental Protection Agency	Environmental Planning & Evaluation Unit 77 W Jackson Blvd. Mailstop B-19J Chicago, IL 60604-3590	Electronic Service	No	OFF_SL_21-823_Official
Sara	Van Norman	sara@svn.legal	Van Norman Law, PLLC	Van Norman Law, PLLC 310 4th Ave. S., Ste. 5010 Minneapolis, MN 55415	Electronic Service	No	OFF_SL_21-823_Official
Ken	Vraa	N/A		6623 Peony Lane N Maple Grove, MN 55311	Paper Service	No	OFF_SL_21-823_Official
Cynthia	Warzecha	cynthia.warzecha@state.mn.us	Minnesota Department of Natural Resources	500 Lafayette Road Box 25 St. Paul, Minnesota 55155-4040	Electronic Service	No	OFF_SL_21-823_Official
Tom	Watson	twatson@iphouse.com	Whitefish Area Property Owners Association	39195 Swanburg Court Pine River, MN 56474	Electronic Service	No	OFF_SL_21-823_Official
James	Watts	james.watts@enbridge.com	Enbridge Pipelines (North Dakota) LLC	26 E Superior St Ste 309 Duluth, MN 55802	Electronic Service	No	OFF_SL_21-823_Official
Alan	Whipple	sa.property@state.mn.us	Minnesota Department Of Revenue	Property Tax Division 600 N. Robert Street St. Paul, MN 551463340	Electronic Service	No	OFF_SL_21-823_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Jonathan	Wolfgram	Jonathan.Wolfgram@state.mn.us	Office of Pipeline Safety	445 Minnesota St Ste 147 Woodbury, MN 55125	Electronic Service	No	OFF_SL_21-823_Official
David	Zoll	djzoll@locklaw.com	Lockridge Grindal Nauen PLLP	100 Washington Ave S Ste 2200 Minneapolis, MN 55401	Electronic Service	No	OFF_SL_21-823_Official