



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES
LANSING



DANIEL EICHINGER
DIRECTOR

July 22, 2020

VIA EMAIL

Mr. Vernon Yu
Executive Vice President and President, Liquids Pipelines
Enbridge Inc.
200, Fifth Avenue Place
425 — 1st Street SW
Calgary, Alberta
Canada T2P 3L8

Re: Follow-Up Communication to July 17 Letter on Financial Assurance

Dear Mr. Yu:

On July 17, 2020, I sent you a letter on behalf of the State of Michigan requesting that Enbridge, Inc., the Canadian parent company to the Grantee and its successors to the 1953 Easement, enter into a written agreement with the State of Michigan to provide sufficient Financial Assurance to cover a catastrophic release from the Dual Pipelines located in the Straits of Mackinac. This request was based on the recommendations of American Risk Management Resources Network (ARMRN) in its Report entitled *An Analysis of The Enbridge Financial Assurances Offered to the State of Michigan On Matters Related To The Operation of the Enbridge Line 5 Pipeline At the Straits of Mackinac* (October 29, 2019).

In response to my letter, Enbridge, Inc. made a public statement on July 17, and submitted a letter response dated July 20. We have a number of significant concerns with the company's responses, and I have included an attachment to this correspondence that discusses those concerns in greater detail. We believe a written Financial Assurance Agreement between the State of Michigan and Enbridge, Inc. is appropriate based on the following considerations:

- ARMRN found that Enbridge, Inc. is not subject to the indemnity obligation or the financial assurance commitments under either the 1953 Easement or the Agreements negotiated with the Snyder Administration. This conclusion was based in large measure on sworn testimony provided by the Chief Financial Officer for Enbridge's U.S. operations, Mr. Chris Johnston.
- Mr. Johnston's testimony occurred in a "Certificate of Need/Routing Permit" proceeding to reconstruct Enbridge Line 3 that was held before the Minnesota Public Utilities Commission (PUC) in 2017-2018. In the Minnesota PUC Hearing, Mr. Johnston testified that Enbridge, Inc., as a Canadian parent company, is not

contractually obligated to cover the indemnity and other financial assurance commitments of its subsidiaries.

- The signatories to the 1953 Easement and the Snyder Agreements are subsidiaries of Enbridge, Inc. (the “U.S. Subsidiaries”). The U.S. Subsidiaries are: Enbridge Energy, Limited Partnership; Enbridge Energy Company, Inc.; and Enbridge Energy Partners, L.P.
- Enbridge, Inc. is not a signatory to the 1953 Easement or the Snyder Agreements.
- Because Enbridge, Inc. is not obligated to cover the financial assurance commitments of its subsidiaries, the reference in the Second Agreement to “parent companies” maintaining financial assurance mechanisms is, as noted by ARMRN, a “purely voluntary endeavor for Enbridge, Inc.”
- ARMRN concluded that, based on its review of available financial information, the U.S. Subsidiaries do **not** have \$1.878 billion in liquid assets, credit facilities and insurance to cover losses and damages arising from a rupture of Line 5.
- In her Findings of Fact, Conclusions of Law and Recommendation (April 23, 2018), Minnesota Administrative Law Judge Ann O’Reilly accepted Mr. Chris Johnston’s testimony, finding that Enbridge, Inc. was insulated from the Line 3 Applicant’s (the subsidiary’s) liabilities through a complicated corporate structure of limited partnerships, limited liability companies, and subsidiaries.
- The Minnesota ALJ recommended that Minnesota obtain a guaranty and indemnity/hold harmless agreement from Enbridge, Inc. to cover the financial liabilities of the Line 3 Applicant. It is our understanding that Enbridge, Inc. indeed provided such a guaranty/indemnity.

For the reasons cited above and more fully discussed in the Attachment, it is imperative that the State of Michigan obtain a written agreement from Enbridge, Inc. to assume the indemnity and additional financial assurance obligations of its U.S. Subsidiaries under the 1953 Easement and the Agreements. If we have misstated the reasons supporting entry of such an agreement, please inform us where we have erred and identify how Enbridge, Inc. is legally bound to meet the U.S. Subsidiaries’ liabilities.

In responding to my July 17 letter, Enbridge, Inc. pledged to take “*full responsibility for the clean-up of any incident in Michigan or anywhere along our pipeline system.*” We ask Enbridge, Inc. to translate that pledge into a legally binding, written agreement to indemnify and hold harmless the State of Michigan for any spill or release from the Dual Pipelines located in the Straits. We look forward to the company’s cooperation and commitment to do so as we seek to protect and preserve Michigan’s irreplaceable public trust resources.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dan Eichinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Daniel Eichinger, Director
Michigan Department of Natural Resources

cc: Mr. Mike Koby, Vice President, U.S. Operations
Mr. Peter Holran, Director of U.S. Government Affairs
Mr. Steven Chester

ATTACHMENT

Comments on Enbridge, Inc. Responses to DNR Director Eichinger's July 17, 2020 Letter

On July 17, 2020, Enbridge, Inc. ("Enbridge") made a public statement in response to DNR Director Eichinger's Financial Assurance Letter, dated July 17, 2020. Subsequently, on July 20, 2020, Enbridge sent a letter to Director Eichinger in further response to his July 17 correspondence. In their letter, Enbridge makes a number of claims that are false or misleading. The following comments are offered in reaction to the most significant mischaracterizations and misstatements.

Both your July 17 letter and your press release intimate that the State lacks today any written agreement to provide sufficient financial assurances to the State. [July 20 Letter]

This is intentionally misleading. The point of importance here is that the State of Michigan does **not** have a written indemnity/financial assurance agreement with Enbridge, Inc., the Canadian parent holding company, to cover a catastrophic release from the Dual Pipelines in the Straits of Mackinac. The only indemnity and financial assurance agreements that exist are between the State and the U.S. Subsidiaries of Enbridge, Inc. that own and operate Line 5. The justification for seeking a written agreement from Enbridge, Inc. was clearly and repeatedly made by Enbridge's CFO of U.S. Operations, Mr. Chris Johnston: **Enbridge, Inc., as a Canadian parent company, is not contractually obligated to cover the indemnity and other financial assurance commitments of its subsidiaries.**

Background and context on this point is as follows:

- In its Report entitled, *An Analysis of The Enbridge Financial Assurances Offered to the State of Michigan On Matters Related To The Operation of the Enbridge Line 5 Pipeline At the Straits of Mackinac* (October 29, 2019), the American Risk Management Resources Network (ARMRN) found that Enbridge, Inc. is not subject to the indemnity obligation or the financial assurance commitments under either the 1953 Easement or the Agreements negotiated with the Snyder Administration.
- Importantly, ARMRN's finding was based largely on sworn testimony provided by the Chief Financial Officer for Enbridge's U.S. operations, Mr. Chris Johnston. Mr. Johnston's testimony occurred in a "Certificate of Need/Routing Permit" proceeding to reconstruct Enbridge Line 3 that was held before the Minnesota Public Utilities Commission (PUC) in 2017-2018.
- In the Minnesota PUC Hearing, Mr. Johnston testified that Enbridge, Inc., as a Canadian parent company, is not contractually obligated to cover the indemnity and other financial assurance commitments of its subsidiaries.

- The following quotes from the ARMRN Report provide further context for this finding:
 - *Due to the corporate structure of Enbridge, Inc., only the assets of the Signatories are obligated by The Agreements [with the prior Administration]. We have reached this conclusion based on the sworn November 9th, 2018 testimony of Mr. Chris Johnston. That testimony was provided in an evidentiary hearing for the Minnesota Public Utilities Commission (PUC). The PUC hearing pertained to the siting of a new Enbridge Line 3 which is not related to Line 5.*
 - *... . Mr. Johnston is the Chief Financial Officer of Enbridge Energy Partners, L.P. ... the largest U. S. based operation of Enbridge, Inc. and is an actual Signatory to the Agreements [and]... successor company to the Enbridge company that was granted the Easement in 1953. As the CFO of the U.S. operations of Enbridge, Inc. and the lead Signatory to the Agreements, Mr. Johnston is a credible expert on the company structure of Enbridge, Inc. and its U.S. operations.*
 - *In the Minnesota PUC hearing, Mr. Johnston testified that Enbridge, Inc. is not contractually obligated to stand behind the indemnity agreements of a subsidiary.*
 - *The State of Michigan is only holding an indemnity obligation from the Signatories in the Second and Third Agreements and the Easement; those companies are Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P.*
 - *Only the Signatories and their respective successors are obligated by these Agreements. Therefore, only the assets of the Signatories to the Agreements should be used to verify the financial assurance amount.*
 - *Based on the testimony of Mr. Johnston, the contribution of funds under an indemnity agreement made with a subsidiary would appear to be to be a purely voluntary endeavor for Enbridge, Inc.*

ARMRN Report, pp. 3-4; see also p. 8 (Emphasis added).

- In his sworn testimony before the Minnesota PUC, Mr. Johnston was unequivocal as to Enbridge, Inc.'s liability for a subsidiary's financial liabilities:

Q [Judge O'Reilly]: I thought I just said that, but -- and according to your testimony, the [Certificate of Need] Applicant cannot bind Enbridge its parent, ultimate parent company, to any financial issues in this case?

A [Chris Johnston]: That's correct.

Evid. Hrg. Tr. Vol. 6A at 73 (Johnston).

- In her Findings of Fact, Conclusions of Law and Recommendation (April 23, 2018), Minnesota Administrative Law Judge Ann O'Reilly was likewise unambiguous in concluding the following:
 - 983. An expectation that Enbridge, Inc., would cover Applicant's losses if Applicant were to become insolvent, simply because Applicant is in the "family" of Enbridge, Inc. entities, is *misguided and fanciful*. Applicant's witness clearly admitted that Enbridge, Inc. will not be liable for spills or cost of cleanup for Line 3. This is because *Enbridge, Inc. remains insulated from Applicant's liabilities through a complicated corporate structure of limited partnerships, limited liability companies, and subsidiaries*.

Findings of Fact, p. 272 (Emphasis added).

- Based on expert testimony from Mr. David Dybdahl of ARMRN, Judge O'Reilly recommended that Minnesota obtain a guaranty and indemnity/hold harmless agreement from Enbridge, Inc. to cover the financial liabilities of the Applicant for the Certificate of Need/Routing Permit, a subsidiary of the Canadian parent.

Findings of Fact, p. 276.

- It is our understanding that Enbridge, Inc. indeed provided such a guaranty/indemnity.
- ARMRN has recommended that the State of Michigan similarly obtain a written agreement from Enbridge, Inc. to assume the indemnity obligations under the 1953 Easement, and to obtain specific types and amounts of liability insurance for the Dual Pipelines.

The \$1,878,000,000 financial assurance provided by Enbridge under the Agreements specifically meets Enbridge's potential "total quantifiable response liability for a worst-case discharge from the Line 5 Dual Pipelines" [July 20 Letter]

Once again, this statement is misleading. This sentence is referring to the financial capabilities of Enbridge, Inc. – not the U.S. Subsidiaries that own and operate Line 5. In the ARMRN Report, the authors found that, as of August 2019, Enbridge, Inc. "*currently has the capability to fund \$1.878 billion for the potential damages caused by a petroleum product release from Line 5.*" However, noting that only the assets of the Signatories (U.S. Subsidiaries) are obligated by the Agreements negotiated with the Snyder Administration, ARMRN recommended against accepting Enbridge, Inc. assets as evidence of financial assurance "*unless Enbridge Inc. becomes a signatory to The Agreements with the State.*" ARMRN Report, p. 3 (Emphasis added).

- In relevant part, the ARMRN Report states as follows:
 - Based on the last historical publicly available financial information on the Signatories, which is found in the 2018 September 10-Q of Enbridge Energy Partners L.P., the Signatories *did not have \$1.878 billion in liquid assets, credit facilities and insurance for the damages arising from a rupture of Line 5.*
 - The liquid financial resources of the Signatories based on September of 2018 10-Q information are shown in Appendix C. We used September 2018 for this comparison of assets between the Signatories and Enbridge Inc. because it is no longer possible to evaluate the financial resources of Enbridge Energy Partners L.P. using publicly available information.
 - *Enbridge Energy Partners, L.P. no longer produces its own financial statements for public review.* As described in the Enbridge, Inc. 2018 10-K, an unnamed wholly owned subsidiary of Enbridge, Inc. purchased all of the stock of Enbridge Energy Partners, L.P. at the end of 2018. At that point in time Enbridge Energy Partners, L.P. became a wholly owned subsidiary of Enbridge, Inc. Because there would be no further public trading in the stock of Enbridge Energy Partners, L.P., *the subsidiary no longer produces its own 10-K or 10-Q reports for the U.S. Securities and Exchange Commission.*
 - We noted that in October 2019, the assets of Enbridge, Inc. were used in the Financial Assurance Verification Form supplied to the State as required under the Second and Third Agreements. However, Enbridge, Inc. is not a party to the 1953 Easement or a Signatory to the subsequent Agreements. Based on the testimony of Mr. Johnston, *the contribution of funds under an indemnity agreement made with a subsidiary would appear to be to be a purely voluntary endeavor for Enbridge, Inc.*

ARMRN Report, p. 4 (Emphasis added).

The Second Agreement requires “the Enbridge entity or entities that own and operate Line 5, or the parent companies of such Enbridge entity(ies), will maintain in force financial assurance mechanisms that meet or exceed.” [July 17 Statement and July 20 Letter]

In its initial public response to DNR Director Eichinger’s letter, Enbridge, Inc. referenced the above language from the Second Agreement, and asserted that it “pledges to take full responsibility for the clean-up of any incident in Michigan or anywhere along our pipeline system....” The glaring problem with the Second Agreement, however, is that Enbridge, Inc. is not a signatory to the Agreement. Moreover, the Agreement provides no commitment by Enbridge, Inc. to indemnify the State for losses or damages from operation of Line 5, and makes only cursory reference to maintaining financial assurance

mechanisms. This statement appears to be little more than a comment that the parent companies of the U.S. Subsidiaries will voluntarily share certain financial information and falls well short of an actual written, legally binding commitment to provide such financial assurance protections.

...I'm sure that you are well aware that the substantial assets of Enbridge subsidiaries in the United States are more than sufficient to cover Enbridge's assurance obligations and that, under the Oil Pollution Act, the owner of the Dual Pipelines would be obligated as a responsible party to assume the cost of any cleanup. [July 20 Letter]

Contrary to Enbridge's claims, neither ARMRN nor the State of Michigan is confident that the U.S. Subsidiaries have sufficient assets to cover the costs of a catastrophic release from the Dual Pipelines. Based on its review of available financial information, ARMRN concluded just the opposite, i.e.; the U.S. Subsidiaries do **not** have \$1.878 billion in liquid assets, credit facilities and insurance to cover losses and damages arising from a rupture of Line 5. Complicating matters, ARMRN reported that, through corporate stock purchases and other maneuvering, it is no longer possible to evaluate the financial resources of the U.S. Subsidiaries.

Lastly, it may be true that the "owner" of the Dual Pipelines is liable for cleanup costs under the Oil Pollution Act, but Enbridge, Inc., the Canadian parent company, is not an owner of the Dual Pipelines - the U.S. Subsidiaries are the owners. According to Enbridge's CFO, Enbridge, Inc. is not obligated to cover the indemnity and other financial assurance commitments of the U.S. Subsidiaries. To overcome this deficiency, ARMRN has recommended that Enbridge, Inc. enter into a written agreement to indemnify and hold harmless the State of Michigan for any costs associated with a catastrophic release from the Dual Pipelines, and to provide specific liability insurance coverage.