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December 21, 2021

Ms. Lisa Felice, Executive Secretary  
Michigan Public Service Commission  
7109 W. Saginaw Hwy.  
Lansing, MI 48917

RE: MPSC Docket No. U-20763

Dear Ms. Felice:

Attached herewith for filing in the above-referenced matter, please find the *Certificate of Service* and *Enbridge Energy, Limited Partnership's ("Enbridge") Motion to Strike Portions of the Rebuttal Testimony of Richard Kuprewicz Filed on Behalf of the Bay Mills Indian Community or Other Appropriate Relief*.

If you have any questions with the attached, please do not hesitate to contact me.

Very truly yours,

**Fraser Trebilcock Davis & Dunlap, P.C.**

*/s/ Michael S. Ashton*

Michael S. Ashton

/kb

Enclosures

cc: All parties of record

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

IN RE ENBRIDGE ENERGY, LIMITED )  
 PARTNERSHIP )  
 )  
 Application for the Authority to Replace and )  
 Relocate the Segment of Line 5 Crossing the )  
 Straits of Mackinac into a Tunnel Beneath )  
 the Straits of Mackinac, if Approval is )  
 Required Pursuant to 1929 PA 16; MCL )  
 483.1 *et seq.* and Rule 447 of the Michigan )  
 Public Service Commission’s Rules of )  
 Practice and Procedure, R 792.10447, or the )  
 Grant of other Appropriate Relief )

Case No. U-20763

**ENBRIDGE ENERGY, LIMITED PARTNERSHIP’S MOTION TO  
 STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF RICHARD  
 KUPREWICZ FILED ON BEHALF OF THE BAY MILLS INDIAN  
 COMMUNITY OR OTHER APPROPRIATE RELIEF**

**I. INTRODUCTION**

Enbridge Energy, Limited Partnership (Enbridge) files this motion to strike portions of the pre-filed rebuttal testimony of Richard Kuprewicz because he seeks to raise a new issue (his purported claim that there is low risk of a tunnel explosion which could result in a release) for the first time in this proceeding when no other witness raised this concern in their testimony. Indeed, the factual information relied upon by Mr. Kuprewicz was presented in Enbridge’s direct case filed on April 17, 2020 and supplemental direct case filed on December 23, 2020. Thus, there is no legitimate reason why this new issue could not have been raised in Bay Mills Indian Community’s direct case, instead of for the first time in Mr. Kuprewicz’s rebuttal testimony. Now allowing this testimony in rebuttal causes prejudice and potential delay and, therefore, it should be stricken.

The portion of Mr. Kuprewicz’s rebuttal testimony that should be stricken are:

- a. Page 5, line 9 starting with “1)” through line 11 ending with “2)
- b. Page 6, line 5 through page 13, line 16, and
- c. Page 15, line 15 through page 16, line 4.

These portions of Mr. Kuprewicz’s testimony should be stricken because they are not proper rebuttal testimony.

## **II. FACTUAL OVERVIEW**

On April 17, 2020, Enbridge filed its application, direct testimony and exhibits. This included Exhibit A-9, which concluded that the probability of a release from the tunnel was “virtually zero.” (*Id.* at p. 9.)

On May 11, 2020, Bay Mills Indian Community (BMIC) filed its petition to intervene. Nowhere in its petition did BMIC raise any concern that there is low risk of a tunnel explosion which could result in a release into the environment.

On December 23, 2020, Enbridge filed supplemental direct testimony and exhibits. This included Exhibit A-13 which provides an overview of the operation and maintenance of the tunnel, including its leak detection and ventilation systems and the use of Class 1, Division 2 instrumentations within the tunnel. (Exhibit A-13 at pages 8, 15 - 16 of 26.) Also included was Exhibit A-14 which incorporated in depth responses to certain Staff discovery, addressing among other things the wall thickness and maximum operating pressure (MOP) for the replacement pipe segment. (Exhibit A-14, at p. 5 of 178.)

On September 14, 2021, Staff and the Mackinac Straits Corridor Authority (MSCA) filed their direct case. No Staff or MSCA witness ever raised the issue of a tunnel explosion which could result in a release into the environment. In fact, Staff’s witness Mr. Warner concluded “there is no credible scenario that would result in a release of product from the tunnel into the Straits.” (Warner

at p. 28, line 14 - 16, citing Enbridge's Exhibit A-9.) This is the same conclusion reached by Enbridge in its direct case.

On September 14, 2021, BMIC filed the direct testimony of eight (8) witnesses. None of these witnesses raised the issue that a potential explosion within the tunnel could result in a release into the environment.

On December 14, 2021 and for the first time in this proceeding, BMIC raised an assertion that there is a low possibility of a tunnel explosion which could result in a release into the environment. In its effort to raise this new issue for the first time, Mr. Kuprewicz ostensibly claims to be rebutting Staff and MSCA witnesses. Yet, none of these witnesses even mentions an explosion within the tunnel as being or not being a possibility, let alone that such a risk could be a cause of a release into the Straits.

In raising this new issue for this first time in its rebuttal, Mr. Kuprewicz does so by offering his criticism of Exhibit A-9 (filed by Enbridge on April 17, 2020). Kuprewicz p. 7. He also does so by offering his criticism the tunnel's ventilation system, the leak detection system, and the use of Class 1, Division 2 instrumentations within the tunnel all described in Exhibit A-13 (filed by Enbridge on December 23, 2020). Kuprewicz at pp. 8, and 12 -13. He also discusses the impact of the risk based on the size and MOP of the replacement pipe segment described in Exhibit A-14 (filed by Enbridge on December 23, 2020). Kuprewicz at 10 -12. In asserting for the first time that there is a low possibility of a tunnel explosion which could result in a release into the environment, he does so by criticizing information which was part of Enbridge's direct case. There is simply no reason why Mr. Kuprewicz testimony should not have been filed as part of BMIC's direct case.

### III. LEGAL ANALYSIS

#### A. MR. KUPREWICZ'S TESTIMONY REGARDING A LOW POSSIBILITY OF A TUNNEL EXPLOSION IS NOT PROPER REBUTTAL TESTIMONY

In its petition to intervene, BMIC did not raise the purported claim that there is a low possibility of a tunnel explosion which could result in a release into the environment. This issue was also not raised in the direct case of Enbridge, Staff or other parties. The first time this issue is being raised is in Mr. Kuprewicz's rebuttal testimony.

To the extent that BMIC sought to raise this issue, BMIC was required to do so in its direct case. *Winiemko v. Valenti*, 203 Mich.App. 411, 419; 513 N.W.2d 181 (1994) (where the court refused to allow rebuttal testimony where "the rebuttal testimony offered by defendants could have been introduced during defendants' case in chief."); *Turfe v. Intihar*, 38 Mich.App. 144, 144- 145; 195 N.W.2d 773 (1972). *See also, In the matter of the application of the Midland Cogeneration Venture Limited Partnership*, October 13, 1988, Opinion and Order at p.3 (stating that rebuttal testimony is "for the purpose of rebutting specific facts, judgments of the other parties that could not have been reasonably done with your direct case.")

Here it is undisputed that BMIC could have presented this testimony in its direct case. The underlying facts relied upon by Mr. Kuprewicz were presented in Enbridge's direct case filed on April 17, 2020, and supplemental direct case filed on December 23, 2020. This includes: (1) his criticism of Exhibit A-9 (filed on April 17, 2020);<sup>1</sup> (2) his criticism the tunnel's ventilation system, the leak detection system, and the use of Class 1, Division 2 instrumentations within the tunnel all described in Exhibit A-13 (filed on December 23, 2020);<sup>2</sup> and (3) the impact of this risk based on the size and MOP of the replacement pipe segment described in Exhibit A-14 (filed on December

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<sup>1</sup> Kuprewicz p. 7.

<sup>2</sup> Kuprewicz at pp. 8, and 12 -13.

23, 2020).<sup>3</sup> There is simply no reason that the assertion that there was a low possibility of a tunnel explosion which could result in a release into the environment could not have been made in BMIC's direct case.

Rebuttal testimony also should be limited to "when it directly tends to disprove a witness' exact testimony." *Westland v. Okopski*, 208 Mich. App. 66, 72; 527 N.W.2d 780 (1994). Any claim that Mr. Kuprewicz is rebutting Staff's or MSCA's witnesses exact testimony is pure fiction. Instead, Mr. Kuprewicz is critical of these witnesses for failing to address what Mr. Kuprewicz views as a low possibility of an explosion, even though that issue was not raised in BMIC's petition to intervene or BMIC's direct case. Mr. Kuprewicz's rebuttal testimony does not rebut any exact testimony of any witness, but instead attempts to insert an entirely new issue in the guise of rebuttal testimony.

This fact is shown by review of Enbridge's direct case, which reached the same conclusion that was reached by Staff in its direct case and that Mr. Kuprewicz seeks to rebut. Enbridge's Exhibit A-9 discusses the probability of a release as being "virtually zero" and stated that there was "no credible scenario that would result in a release ... into the Straits." Exhibit A-9, p. 6. These are the same conclusions reached by Staff in its direct case that Mr. Kuprewicz is now purporting to rebut. Yet, there is simply no reason why the issue was not addressed in BMIC's direct case when made by Enbridge, and no justification exists to raise it now in rebuttal.

#### **B. ALLOWING THIS REBUTTAL CAUSES UNDUE PREJUDICE**

While courts and this Commission have some discretion in allowing rebuttal testimony, here there is no good reason for doing so. By raising this issue for the first time in its rebuttal testimony and given this case's current schedule which does not allow for filing surrebuttal

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<sup>3</sup> Kuprewicz at p. 10 -12.

testimony, BMIC attempts to ensure that it not only receives the proverbial “last word” on this issue, but that it receives **the only word on this issue**. As it currently stands, no other party will be allowed to file surrebuttal testimony to address this issue. This is highly prejudicial to the other parties, clouds the record upon which the Commission must rely with these untested assertions, and does nothing but reward a party for procedural gamesmanship.

While the Commission does have authority to allow surrebuttal testimony pursuant to Rule 427(3), being R 792.10427(3), this risks further delay and prejudice in the proceeding. Enbridge’s Application has been pending since April 17, 2020. A final Commission order is not likely until mid-2022. This means this case will not likely be decided until two-years after having been filed. In addition, the Mr. Kuprewicz’s testimony was filed on December 14, 2021, with the evidentiary hearing to begin on January 13, 2022. Given the interceding holidays, this leaves very few business days for other parties to prepare pre-filed surrebuttal testimony before the start of the evidentiary hearing.

Given the fact that this testimony should have been filed with BMIC direct testimony and the procedural prejudice that would be caused by allowing its admission, this portion of his rebuttal testimony should be stricken.

### **III. CONCLUSION**

For the reasons set forth above, the following portions of the rebuttal testimony of Mr. Kuprewicz should be stricken:

- a. Page 5, line 9 starting with “1)” through line 11 ending with “2)
- b. Page 6, line 5 through page 13, line 16, and
- c. Page 15, line 15 through page 16, line 4.

In the alternative, the Commission should grant other appropriate relief, such as allowing parties to file surrebuttal testimony pursuant to Rule 427(3), being R 792.10427(3).

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'MASHTON', written over a horizontal line.

Dated: December 21, 2021

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STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

IN RE ENBRIDGE ENERGY, LIMITED )  
 PARTNERSHIP )  
 Application for the Authority to Replace and )  
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 Straits of Mackinac into a Tunnel Beneath the )  
 Straits of Mackinac, if Approval is Required )  
 Pursuant to 1929 PA 16; MCL 483.1 *et seq.* and )  
 Rule 447 of the Michigan Public Service )  
 Commission’s Rules of Practice and )  
 Procedure, R 792.10447, or the Grant of other )  
 Appropriate Relief )

Case No. U-20763

CERTIFICATE OF SERVICE

Katie Bryan hereby certifies that on the 21<sup>st</sup> day of December 2021, she served by electronic mail on the persons identified in the attached service list in the above docket *Certificate of Service* and *Enbridge Energy, Limited Partnership’s (“Enbridge”) Motion to Strike Portions of the Rebuttal Testimony of Richard Kuprewicz Filed on Behalf of the Bay Mills Indian Community or Other Appropriate Relief.*

/s/ Katie Bryan

\_\_\_\_\_  
Katie Bryan

SERVICE LIST FOR U-20763

Administrative Law Judge

Honorable Dennis Mack	<a href="mailto:mackd2@michigan.gov">mackd2@michigan.gov</a>	<i>Michigan Public Service Commission</i>	7109 W. Saginaw Hwy. Lansing, MI 48917
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