



May 12, 2020

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

Via E-filing

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

- Comments in Opposition to Request for Declaratory Ruling by Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council and National Wildlife Federation; and
- Proof of Service

Sincerely,

Christopher M. Bzdok
Chris@envlaw.com

xc: Parties to Case No. U-20763

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the 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

U-20763

**COMMENTS IN OPPOSITION TO REQUEST FOR DECLARATORY RULING
BY
MICHIGAN ENVIRONMENTAL COUNCIL,
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,
TIP OF THE MITT WATERSHED COUNCIL,
AND
NATIONAL WILDLIFE FEDERATION**

May 12, 2020

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I. INTRODUCTION

Enbridge Energy Limited Partnership (Enbridge) asks this Commission to declare that Enbridge's Line 5 replacement project is already authorized by the Commission's 1953 Orders that initially approved the Line 5 pipeline,¹ and requires no further approval under Public Act 16 of 1929. Enbridge's request:

- Is supported by no specific legal analysis;
- Is contrary to the plain language of Act 16;
- Is unwarranted by the facts presented in the application;
- Is an inappropriate subject for a declaratory ruling under longstanding Commission precedent; and
- Is contrary to representations Enbridge made during the development of its 2018 agreements with the State of Michigan for the project.

For these reasons, Enbridge's request for declaratory relief should be denied. The Commission should also clarify that the tunnel is part of the Line 5 replacement project and within the scope of this case.

II. INTERESTS OF THE COMMENTERS

The Michigan Environmental Council (MEC) is a statewide organization with individual supporters, 70 member entities, and a collective membership of over 200,000 people. MEC has intervened in over 100 Commission cases and has filed a petition to intervene in this case. The averments and supporting documents for that petition are incorporated by reference.

¹ *In the matter of the application of Lakehead Pipeline Company, Inc for approval of construction and operation of a common carrier oil pipeline*, Case No. D-3903-53.1, Order dated March 31, 1953 and Supplemental Order dated May 29, 1953; both included as Exhibit A-3 to the application in this case.

The Grand Traverse Band of Ottawa and Chippewa Indians (GTB) is a sovereign Indian Tribe with usufructuary property rights to natural resources in the Straits of Mackinac, including fishing rights. The State of Michigan is obligated to honor these rights, and prohibited from diminishing them, under the March 28, 1836 Treaty of Washington (7 Stat. 491). GTB will be filing a petition to intervene in this case, and the averments and supporting documents for that petition are incorporated by reference.

Tip of the Mitt Watershed Council (Watershed Council) is a non-profit corporation headquartered in Petoskey, Michigan with 300 active volunteers and over 2,127 members. The Watershed Council works to protect and enhance the quality of water resources in Antrim, Charlevoix, Cheboygan, and Emmet Counties. Its service area includes the entire southern shore of the Straits of Mackinac, including the project area described in the application in this case. The Watershed Council will be filing a petition to intervene in this case, and the averments and supporting documents for that petition are incorporated by reference.

The National Wildlife Federation (NWF) Great Lakes Regional Center (GLRC) is a non-profit organization that works throughout the Great Lakes basin and represent over 200,000 members and supporters from across the state of Michigan. The National Wildlife Federation works on critical national and regional water resource issues with a particular focus on protecting and restoring our Great Lakes. The NWF will be filing a petition to intervene in this case, and the averments and supporting documents for the petition are incorporated by reference.

III. SUMMARY OF ENBRIDGE’S APPLICATION AND DECLARATORY RELIEF REQUEST.

In its application, Enbridge seeks Commission approval – “to the extent required by law” – to replace the 4-mile segment of its Line 5 pipeline that crosses the Straits of Mackinac with a

new pipeline in an underground tunnel below the lakebed of the Straits.² Enbridge states that the project also includes short segments of new pipe to connect the replacement segment; as well as “all the associated fixtures, structures, systems, coating, cathodic protection and other protective measures, equipment and appurtenances relating to the replacement pipe segment and connection to the existing Line 5 pipeline on both sides of the Straits.”³

The Commission approved the construction and operation of Line 5 in its 1953 Orders in Case No. D-3903-53.1 cited above. The existing segment of Line 5 that crosses the Straits does so within a 1953 easement that Enbridge holds from the State of Michigan.⁴ To construct the tunnel and install the replacement pipeline segment within it, Enbridge requires a new easement, which the Michigan Department of Natural Resources (DNR) granted to the Mackinac Straits Corridor Authority (MSCA), who assigned it to Enbridge.⁵ Enbridge also requires a 99-year lease with the MSCA for the tunnel and replacement pipe.⁶

Enbridge estimates that the tunnel will take five to six years and cost \$350 to \$500 million to construct.⁷ Despite the facts that the replacement pipe will be located in the tunnel, that the tunnel will be used in connection with the replacement pipe, and that the only reason to build the tunnel is to house the replacement pipe, Enbridge claims that “the Project does not include the tunnel itself...”⁸ This assertion appears critical to Enbridge’s request for a declaratory ruling that

² Application, paragraph 3.

³ *Id.*

⁴ Exhibit A-2. The legal validity of that easement, and Enbridge’s compliance with it, are subjects of other pending litigation.

⁵ Exhibit A-6.

⁶ Exhibit A-5, p 34, Section 5.3.

⁷ Exhibit A-9, p 14.

⁸ Application, paragraph 3.

it requires no further Commission approval for the Line 5 replacement project because the Commission's 1953 Orders constitute all of the approvals Enbridge needs.

Enbridge's primary rationale for why the tunnel is not part of the project for which it requests Commission approval is that the tunnel is the subject of an April 6, 2020 Joint Permit Application to the Michigan Department of Environment, Great Lakes, and Energy (EGLE) and U.S. Army Corps of Engineers (Corps).⁹ Indeed, the largest portion of Enbridge's filing in this case is the joint permit application, which Enbridge submitted as pre-filed Exhibit A-11. However, it is important to note that EGLE has already rejected Enbridge's joint permit application as incomplete, and so Enbridge cannot rely on Exhibit A-11 as the factual basis for any argument in support of its request for declaratory ruling here.¹⁰ It is also worth noting that Enbridge's testimony and most of its exhibits in this case discuss the tunnel extensively.

IV. ENBRIDGE'S REQUEST FOR DECLARATORY RULING SHOULD BE DENIED.

A. Enbridge's Request for Declaratory Ruling is Contrary to the Plain Language of Act 16 based on the Facts Presented in the Application and Commission Precedent.

The first reason why Enbridge's request should be denied is that it has no support in the language of Act 16, nor in the application of Act 16 to the facts presented in Enbridge's application. Act 16 vests in the Commission broad authority over oil pipelines and all fixtures and equipment used in connection with them, which would include a tunnel that houses them. Further, Act 16 includes no exemption from regulation for new or re-located pipeline segments.

⁹ Application, paragraph 3; Exhibit A-11.

¹⁰ See Ex 1 to these comments, May 4, 2020 letter from EGLE to Enbridge.

1. Rule 447 and Act 16 require Commission approval of the new project.

Commission Rule 447 requires a corporation that wants to construct facilities to transport petroleum products to apply for approval from the Commission:

(1) An entity listed in this subrule shall file an application with the commission for the necessary authority to do the following:

* * *

(c) A corporation, association, or person conducting oil pipeline operations within the meaning of 1929 PA 16, MCL 483.1 to 483.9, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute.¹¹

Under the plain meaning of Rule 447, if the replacement pipe is a facility to transport petroleum products, then Enbridge must apply for Commission approval to construct it. If the connector segments, and “all the associated fixtures, structures, systems, coating, cathodic protection and other protective measures, equipment and appurtenances relating to the replacement pipe segment” are facilities to transport petroleum products, then Enbridge must apply for Commission approval to construct them. Finally, if the \$500 million, 99-year underground tunnel below the Straits that will house the replacement pipe is a facility to transport petroleum products, then Enbridge must apply for Commission approval to construct it.

The text of Act 16 further supports these conclusions. The Commission has noted that “Act 16 provides the Commission with broad jurisdiction to approve the construction, maintenance, operation, and routing of pipelines delivering liquid petroleum products for public use.”¹² Section 1 of Act 16 provides that a person “does not ... have or possess the right to locate, maintain, or

¹¹ R 792.10447(1)(c).

¹² *In re Wolverine Pipe Line Company*, Case No. U-13225, Final Order dated July 23, 2002, 2002 WL 31057451.

operate the necessary pipe lines, fixtures, and equipment belonging to, or used in connection with that business on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within this state, or have or possess the right of eminent domain, or any other right, concerning the business or operations, in whole or in part, except as authorized by and subject to this act.”¹³ This language plainly brings within the Commission’s jurisdiction and authority the locating of any fixtures or equipment used in connection with the transporting of petroleum products anywhere in Michigan. Similarly, Section 6 requires that before any corporation or person shall have the “right to locate, maintain, or operate pipe lines, fixtures or equipment appurtenant thereto,” it shall file with the Commission an acceptance of the provisions of Act 16.¹⁴

Specific to the tunnel, the definition of a fixture is “something that is fixed or attached (as to a building) as a permanent appendage or as a structural part.”¹⁵ Another definition is “an item of movable property so incorporated into real property that it may be regarded as legally a part of it.”¹⁶ Plainly these definitions encompass a tunnel built to house an oil pipeline. Further, there are no exceptions in Act 16 for tunnels.

The same conclusion holds even if the tunnel is not part of the project, as Enbridge claims. There are no exceptions in Act 16 for new segments of an existing pipeline constructed in new locations, as Enbridge seems to believe there should be. Nor are there exceptions for new fixtures or equipment used in connection with an existing pipeline, which Enbridge also seems to believe.

¹³ MCL 483.1(2) (emphasis added).

¹⁴ MCL 483.6 (emphasis added).

¹⁵ <https://www.merriam-webster.com/dictionary/fixture>, accessed May 8, 2020.

¹⁶ *Id.*

2. The 1953 Supplemental Order requires a new approval.

Section 8 of Act 16 authorizes the Commission “to make all rules, regulations, and orders, necessary to give effect to and enforce the provisions of this act.”¹⁷ The Commission has issued Rule 447(1)(c), which – as noted above – requires the filing of an application for authority to construct any fixtures or equipment used in connection with a pipeline. In addition to Rule 447, the Commission has also issued orders that give effect to Act 16, consistent with the statutory authorization.

These orders include the Supplemental Order in Case No. D-3903-53.1, where the Commission made findings on the question of whether a new application was required to make changes to an approved pipeline.¹⁸ Lakehead sought a change in design to permit higher operating pressure, in order to transport a heavier grade of crude oil. The Commission determined it appropriate to revise the prior approval rather than require a new application based on these findings:

1. The supplemental petition raises no new issue as to status of petitioner as a common carrier.
2. It does not request any change in the route of the pipeline.
3. The questions raised by the supplemental petition are entirely a matter of engineering design.
4. The public interest can be protected without the necessity of expending the time and money to hold a public hearing.
5. The increased thickness of the pipeline should be approved as proposed by the applicant.¹⁹

¹⁷ MCL 460.486.

¹⁸ Case No. D-3903-53.2, Supplemental Opinion and Order dated May 29, 1953.

¹⁹ *Id.* at p 4.

It is instructive to contrast the findings from the 1953 Supplemental Order with this application:

As to finding #2, Enbridge does request a change in route.²⁰ The change in route is significant enough to require new pipe segments and connectors, and a new easement.²¹

As to finding #3, the questions raised by the application are not simply a matter of engineering design. They involve a \$500 million construction project; substantial risks; weighty policy questions; and a 99-year commitment of State-owned real property to support fossil fuel infrastructure.

As to finding #4, the public interest requires rigorous adjudication, given the weight of the policy matters, the critical importance of protecting Tribal treaty rights, and the applicant's record of pipeline failures and pollution. In order to make thoughtful decisions on issues of this magnitude, the Commission should avail itself of the best information available. That will only happen through compilation of a complete record and evidence vetted by the adversarial process – i.e., through a contested case.

3. Enbridge's arguments are unpersuasive.

Enbridge's statement of reasons for the declaratory relief request – contained in Part IX of the application – does nothing to change the conclusions from the text of Act 16 or the findings in the Supplemental Order.

First, Enbridge asserts: “Given that the Project involves no more than maintaining and continuing to operate Line 5 by replacing and relocating one approximate four-mile segment of the over 600-mile Line to enhance safety and reduce environmental risk at that one segment, the

²⁰ Exhibit A-4.

²¹ Application, paragraph 45.

Project falls squarely within the scope of the Commission’s prior approval to maintain and operate Line 5.”²² To the contrary, the 1953 Order specifically approved construction of a 10-mile-long, 20-inch-diameter pipe²³ across the bottom of the Straits – identifying it separately from the 630-mile-long, 30-inch pipe over the rest of the route – and authorized Enbridge to operate and maintain both segments.²⁴ Now Enbridge seeks to construct a 30-inch pipe in an underground tunnel at a different crossing point under the Straits. To consider building new pipe in a tunnel at a different crossing point as simply “operating” or “maintaining” the existing pipe stretches the meaning of those words beyond recognition.

Next, Enbridge asserts: “The nature of the service and products transported, the operational capacity, and the geographic territory served all remain unchanged by the Project, underscoring that the Project falls within the scope of the Commission’s prior approval to maintain and operate Line 5.”²⁵ This assertion is just demonstrably false. For one thing, the “operational capacity” of the pipeline approved in the 1953 Orders was “120,000 barrels per day and when all of the above pumping stations are constructed and in operation the capacity will be 300,000 barrels per day.”²⁶ Enbridge states that today, “Line 5 has an annual average capacity of 540,000 barrels per day;” and that “this Project will not impact its annual average capacity.”²⁷ So the operational capacity of Line 5 and the Straits segment have both almost doubled from what the Commission approved in 1953. Further, Enbridge does not state what the maximum capacity of Line 5 or the Straits segment

²² Application, paragraph 40.

²³ Now two pipes.

²⁴ Case No. D-3903-53.2, March 31, 1953 Order, p 9.

²⁵ *Id.*

²⁶ Case No. D-3903-53.2, March 31, 1953 Order, p 6.

²⁷ Application, paragraph 13.

is. If the average capacity is 540,000 barrels, likely the maximum capacity is greater than that, and represents an even larger increase from the operational capacity approved in the 1953 Orders. Finally, Enbridge also does not state whether the project will increase the maximum capacity of Line 5 and the Straits segment today. The silence on this point is deafening, and can only be filled in with discovery in a contested case.

Next, Enbridge asserts: “Fundamentally, the replacement of the approximate four-mile segment is no different than the replacement of small portions of facilities owned by electric and gas utilities subject to Rule 447, and the Commission has never taken the position that such maintenance-based replacements require Commission approval and should not do so now.”²⁸ In a similar vein, Enbridge also asserts: “the Project does not involve a proposed new construction of a pipeline or extension of a pipeline that has not already been authorized by the 1953 Order. Rule 447(2)(e). The Project modestly relocates approximately four miles of a 645-mile (previously approved and fully operational) pipeline...”²⁹ The same responses above apply to these assertions. Enbridge’s attempt to equalize a re-located pipeline of a different size into a yet-to-be-constructed, \$500 million, 99-year tunnel to the routine replacement of a section of pipe is not a serious or credible argument.

Next, Enbridge asserts: “Rule 447’s plain language does not require petroleum pipeline operators to file applications for replacement projects that maintain or allow safer operation of their existing utility facilities.”³⁰ Enbridge makes a similar argument about the language of Act 16.³¹ Here, Enbridge’s spin that the tunnel is not part of the project is critical to Enbridge’s

²⁸ Application, paragraph 41.

²⁹ Application, paragraph 43.

³⁰ Application, paragraph 44.

³¹ Application, paragraph 42.

argument. As noted earlier, under the plain text of Rule 447, if the tunnel that will house the replacement pipe is a facility to transport petroleum products, then Enbridge must apply for Commission approval to construct it.³² Further, Act 16 includes “fixtures and equipment belonging to, or used in connection with” pipelines within the scope of facilities the Commission is charged to regulate.³³ Act 16 similarly requires Commission approval to “locate, maintain, or operate pipe lines, fixtures or equipment appurtenant thereto.”³⁴ It is beyond reasonable debate that the tunnel is a fixture used in connection with a pipeline and appurtenant thereto.

Finally, Enbridge asserts: “While the replacement pipe segment will not be placed within the precise easement that existed in 1953, it will be tied to the existing and previously approved Line 5 at both sides of the Straits and located in an easement issued by the State of Michigan in very close geographic proximity to the existing location of the Dual Pipelines.”³⁵ The same responses above apply to this assertion as well. The replacement segment is a new pipe, in a new location, on a new easement, inside a new, \$500 million facility that will be appurtenant to and used in connection with it.

4. Other considerations require a contested case and new approval.

In addition, three other considerations warrant rejection of Enbridge’s position that the 1953 Orders provide all the approval necessary for the replacement segment and tunnel project.

First, the standards that the Commission considers under Act 16 have changed. Today, the Commission will grant an application under Act 16 if it finds that “(1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and

³² R 792.10447(1)(c).

³³ MCL 483.1(2) (emphasis added).

³⁴ MCL 483.6.

³⁵ Application, paragraph 45.

routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed current safety and engineering standards.”³⁶ The commenters believe the scope of the Commission’s review should be broader than these three standards, in recognition of modern realities. Be that as it may, however, the 1953 Orders do not articulate or apply even the existing three standards. The March 31, 1953 Order notes an argument by some intervenors that the project was not in the public interest. However, the Commission rejected that argument in a perfunctory manner, without specific findings or conclusions.

Second, the Michigan Environmental Protection Act (MEPA) did not exist when the 1953 Orders were issued.³⁷ The Commission has recognized that MEPA applies to its decisions – especially decisions under the 1929 oil and gas statutes that do not contain detailed environmental standards themselves.³⁸ Because MEPA applies to Commission decisions under Act 16, and MEPA was never considered in the 1953 Orders, those orders could not approve the project by implication under current law.

Third, and most significantly, the 1953 proceedings involved no Tribal consultation. The Tribes – at least two of which will be intervening in this case – were the original occupants of the property that will be occupied by the project. They retain certain reserved rights to natural resources in the project area under the Treaty of Washington. The State of Michigan and its agencies are bound to honor these rights as a condition precedent of statehood. Any assertion by Enbridge of vested approval rights based on the 1953 Orders pales in comparison to the rights

³⁶ *In re Enbridge Energy Limited Partnership*, Case No. U-17020, Final Order dated January 31, 2013, available on the Commission e-docket.

³⁷ MCL 324.1701, *et seq.*

³⁸ *In the matter of the application of DTE Electric Company for approval of its Integrated Resource Plan pursuant to MCL 460.6t and for other relief*, Case No. U-20471, Order dated February 20, 2020, pp 42-43.

vested by the Tribes' negotiated Treaty terms and antecedent occupancy, which precede Enbridge's claim of right by 117 and 11,000 years, respectively.

For all of these reasons, Enbridge's request for declaratory ruling is contrary to Act 16 and unwarranted by the facts presented in the application. In addition, Enbridge's request is inappropriate for action by declaratory ruling, as explained in the next section.

B. Enbridge's Request is an Inappropriate Subject for Declaratory Ruling under Longstanding Commission Precedent.

Enbridge requests the Commission to issue a declaratory ruling pursuant to Section 63 of the Administrative Procedures Act and Rule 448 of the Commission Rules of Practice and Procedure that Enbridge already has the authority to construct the Line 5 replacement.³⁹ In addition to its lack of legal and factual merit, as a threshold matter the Commission should decline to grant Enbridge's request because it does not meet the requirements of Rule 448. Further, even if Enbridge's request did meet the requirements of Rule 448, the subject of the request is fundamentally inappropriate for a declaratory ruling under longstanding Commission precedent.

1. Enbridge's Application is Ineligible for Declaratory Relief because it is Based on Disputed Facts and Insufficient Legal Justification.

Section 63 of the Administrative Procedures Act (APA) provides in relevant part that:

On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition.⁴⁰

³⁹ Application, paragraph 38.

⁴⁰ MCL 24.263.

Commission Rule of Practice and Procedure 448 provides:

(1) Any person may request a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the commission or of a rule or order of the commission, pursuant to sections 33 and 63 of the act, MCL 24.201, MCL 24.328. A request for a declaratory ruling shall contain, or by attached exhibits show, all of the following:

(a) A complete, accurate, and concise statement of the facts or situation upon which the request is based.

(b) A concise statement of the issues presented.

(c) Specific reference to all statutes, rules, and orders to which the request relates.

(d) An analysis by the person's legal counsel of the issues presented and a proposed conclusion, or the person's analysis of the issues presented and a proposed conclusion.⁴¹

(2) The commission may require that notice of the request for declaratory ruling be provided and may require a contested case proceeding instead of issuing a declaratory ruling.

(3) The decision to issue a declaratory ruling is within the discretion of the commission.

Enbridge's application does not satisfy the APA or Rule 448 criteria because it does not present what the Commission has generally considered "an actual state of facts" to which the Commission may apply a statute it administers, nor does the application present sufficient legal analysis to merit declaratory relief.⁴²

Enbridge predicates its request for declaratory relief on the Commission's findings in its March 31, 1953, Opinion and Order, D-3903-53.1 and the Michigan Supreme Court's decision in

⁴¹ R 792.10448(1).

⁴² *Id.*

Lakehead Pipe Line Co v Dehn, 340 Mich 25, 37; 64 NW2d 903 (1954), specifically “that the construction, operation and maintenance of Line 5 was in the public interest.”⁴³ Enbridge also asserts that “[t]he nature of the service and products transported, the operational capacity, and the geographic territory served all remain unchanged by the Project[.]”⁴⁴ These statements are inaccurate at best. Enbridge’s application shows that the tunnel is not a mere replacement segment envisioned under Rule 447 – it proposes an entirely different location, fixture type, and capacity than was previously approved.⁴⁵ Regarding its legal analysis of the issues presented, Enbridge fails to establish that the continued operation of Line 5 is in the public interest. Additionally, Enbridge argues that the Commission’s 1953 Order “embraces approval of the replacement of one approximate four-mile segment of Line 5.”⁴⁶ “Embraces approval” is not a legal standard, and Enbridge cites no authority to support that it is.

In accordance of the requirements of APA Section 63 and Rule 448, the Commission has declined to issue declaratory rulings when, as here, it is presented with “limited factual and legal analysis. . . .”⁴⁷ The Commission has also declined to issue a declaratory ruling when “the facts thus established would be too sparse for the Commission to give the consideration appropriate to a ruling of this importance.”⁴⁸ Enbridge’s proposed Project has significant policy and public

⁴³ Application, paragraph 39.

⁴⁴ Application, paragraph 40.

⁴⁵ See discussion at Section IV.A.3 of these Comments.

⁴⁶ Application, paragraph 38.

⁴⁷ *In the matter of the application of Severstal Dearborn, LLC, for a declaratory ruling pursuant to 1999 AC, R 460.17701*, Case No. U-17656, Order dated August 5, 2014, p 5.

⁴⁸ *In the matter of the petition of Grand River Equities, Inc. for a declaratory ruling that its proposed service as a provider of inter-exchange and intra-exchange radio links for common carrier paging and radio telephone companies is not subject to regulation by the Commission*, Case No. U-9616, Order dated May 18, 1990, p 2 (finding “that it is appropriate not to issue a declaratory ruling” where “[t]he petition raises an issue concerning the extent of the Commission’s statutory jurisdiction” over wholesale providers of radio equipment to communication common carriers. The Commission noted that “[a]n issue of this nature is, in the Commission’s view, of utmost importance,

interest implications that require a full contested case to adjudicate, and Enbridge has not presented sufficient analysis to comply with the Commission rules or standards as described in its declaratory judgment orders.

In addition to the shortcomings just described, Enbridge's request for declaratory relief is fatally flawed because it has excluded the tunnel from this application – even though the entire Project depends on the tunnel to move forward.⁴⁹ That alone is grounds for the Commission to decline to issue a declaratory ruling for two reasons: First, the absence of the tunnel approval means that a critical factual matter on which the Project depends remains unresolved. The Commission has previously declined to issue a declaratory ruling on these grounds. In Case No. U-11811, the Commission dismissed Consumers Energy Company's petition for a declaratory ruling regarding the company's proposal for a power purchase agreement auction process because "the petition fails to present an 'actual state of facts' [.]"⁵⁰ The Commission noted that "the petition is unable to provide many facts concerning the results of the auction because the details of the disposition will not be known until definitive agreements are negotiated with the winning bidder(s) in January 1999."⁵¹ Requesting a declaratory ruling based on an auction that has yet to occur is akin to requesting a declaratory ruling based on a tunnel whose status is in limbo.

Second, the Commission has typically denied requests for declaratory rulings when other litigation is ongoing. For example, in Case No. U-17962, the Commission denied Consumers

and it is preferable that it be addressed within a procedural context more conducive to the full development of a factual record, in which interested parties would have the opportunity to advance competing viewpoints.”).

⁴⁹ Application, paragraph 3 (“The Project does not include the tunnel itself, which is the subject of separate applications addressed to other state and federal agencies . . .”).

⁵⁰ *In the matter of the petition by Consumers Energy Company for a declaratory ruling related to PPA auction process*, Case No. U-11811, Order dated October 12, 1998, p 2.

⁵¹ *Id.*

Energy Company's request for a declaratory ruling because the relief the Company sought was at issue in a pending complaint case.⁵² In Case No. U-10833, the Commission denied the Holland Board of Public Works' request for declaratory relief because a pending contested case addressed the same issues (namely, the ALJ's decision to admit another party to the case).⁵³ Because the permit for Enbridge's tunnel has yet to be finalized,⁵⁴ and that authorization is a condition precedent to Enbridge's request for declaratory relief, the Commission would be departing from precedent to do so here.

2. Commission Precedent Establishes that Enbridge's Project is not an Appropriate Matter for Declaratory Relief.

Even if Enbridge's application complied with Rule 448's requirements, the Commission should exercise its discretion to decline to issue a declaratory ruling because the weight of Commission authority counsels against doing so.

The Commission has held on multiple occasions that declaratory rulings are inappropriate where the questions raised by the request are complex and important or implicate broad policy:

- In Case No. U-12979, the Detroit Edison Company requested "a declaratory ruling related to the Commission's jurisdiction over the interconnection of distribution equipment owned

⁵² *In the matter of Consumers Energy Company's request for declaratory ruling concerning the provisions of gas transportation to the Midland Cogeneration Venture Limited Partnership pursuant to contracts Executed under 1929 PA 9, as amended*, Case No. U-17962, Order dated October 27, 2015, p 3. The Commission also noted that "it is not settled, as Consumers appears to suggest, whether the force majeure provisions of the contract were actually triggered by the events described in Consumers request and MCV's complaint. MCV should be afforded the opportunity to fully litigate this contested issue." *Id.* The legal and factual issues that would need to be settled prior to Enbridge being eligible for declaratory relief are also not settled.

⁵³ *In the matter of the application of Consumers Power Company for a certificate under 1929 PA 69 authorizing it to make direct deliveries of gas to the City of Holland's Board of Public Works*, Case No. U-10833, Order dated August 14, 1995, p 2, n 1.

⁵⁴ As noted in Section III of these Comments, Enbridge's application is not even complete.

by the utility and Dearborn Industrial Generation, L.L.C., and the treatment of retail power consumption at the Ford Motor Company Rouge industrial complex.”⁵⁵ The Commission concluded that “in light of the importance and complexity of the issues, that the questions raised by the request would be better addressed in a contested case proceeding[.]”⁵⁶

- In Case No. U-13117, the Commission similarly concluded that “the importance and complexity of the issues” counseled against granting Verizon North Inc. and Contel of the South’s “request for a declaratory ruling that tariffed access rates that they implemented . . . are in compliance with the Michigan Telecommunications Act, MCL 484.2101 et seq.”⁵⁷
- In Case No. U-14702, the Commission declined to issue a declaratory ruling requested by MEC/PIGRIM “that a proper PSCR plan and 5-year forecast should include resource planning and implementation of energy conservation, energy efficiency, and/or demand-side management (DSM) programs and strategies.”⁵⁸ The Commission held that “The broad policy change sought by the declaratory ruling makes this case an especially inappropriate setting for a declaratory ruling, because numerous parties not participating here would undoubtedly wish to be heard on this issue.”⁵⁹

⁵⁵ *In the matter of the request of the Detroit Edison Company for a declaratory order regarding MPSC jurisdiction associated with the “Rogue Complex” and Dearborn Industrial Generation, L.L.C.*, Case No. U-12979, Order dated October 11, 2001, p 1.

⁵⁶ *Id.*

⁵⁷ *In the matter of the request of Verizon North Inc. and Contel of the South, Inc., d/b/a/ Verizon North Systems, for a declaratory ruling regarding conflicting provisions of the Michigan Telecommunications Act*, Case No. U-13117, Order dated October 11, 2001, p 1.

⁵⁸ *In the matter of the application of the Detroit Edison Company for authority to implement a power supply cost recovery plan in its rate schedules for 2006 metered jurisdictional sales of electricity*, Case No. U-14702, Order dated September 26, 2006, p 9.

⁵⁹ *Id.* at 12.

- In Case No. U-16190, the Muskegon Development Company sought a declaratory ruling “establishing that the Commission will not approve any exceptions to Rule 17, which prohibits placing any gas well, pool, or field under vacuum with respect to the entire Antrim Shale Formation.”⁶⁰ The Commission noted that the request and cases filed by other applicants hoping to produce natural gas wells through vacuum devices “involve[d] issues of first impression that are likely to establish important and potentially controlling precedent for many producers of natural gas from Antrim Shale Formation gas wells.”⁶¹ Accordingly, the Commission found that broadening the proceeding was preferable to “engaging in a piecemeal, case-by-case adjudication process with respect to the entire Antrim Shale Formation”⁶²

Commission precedent regarding the development of the Commission’s Rules of Practice and Procedure also suggest that a contested case, not a declaratory ruling, is appropriate where the “proceeding implies a broader application of the proceeding’s results than envisioned by the APA[.]” as it would here.⁶³ Further, at least one ALJ has noted (and the Commission seemed to agree) that “the Commission is generally averse to providing declaratory rulings[.]”⁶⁴

⁶⁰ *In the matter of the application of Muskegon Development Company seeking a declaratory ruling that the Commission will not approve any exceptions to R 460.867, which prohibits placing any well, pool or field under vacuum, or in the alternative, for approval to operate certain natural gas wells under a vacuum in Otsego, Crawford, Montmorency, and Oscoda Counties, Michigan*, Case No. U-16190, Order dated April 27, 2010, p 4.

⁶¹ *Id.*

⁶² *Id.* at 5.

⁶³ *In the matter of the proposed Rules of Practice and Procedure Before the Commission*, Case No. U-9480, Order dated May 3, 1990, p 10 (revising Rule 701(2) to provide that Commission can require a contested case proceeding in lieu of declaratory ruling in that circumstance in response to the Michigan Electric and Gas Association’s comments).

⁶⁴ *In the matter of the application of Wisconsin Electric Power Company for authority to increase its rates for the generation and distribution of electricity and for other relief*, Case No. U-16830, Order dated June 26, 2012, p 64.

Despite Enbridge’s statement in its application, the Project is not a modest relocation.⁶⁵ It is significantly “different than the replacement of small portions of facilities owned by electric and gas utilities subject to Rule 447[.]”⁶⁶ As detailed in Section IV.A, the Project is a major departure from anything that was envisioned under the 1953 Order, involving a new route, new construction and connections, and increased capacity. Enbridge’s reasoning for declaratory relief – essentially that it would be more expedient⁶⁷ – is not enough to outweigh the Commission’s traditional reluctance to grant it where the issues and potential consequences are so far-reaching.

C. Enbridge’s Request for Declaratory Ruling is Contrary to Representations Enbridge Made in 2018 to the State of Michigan.

While Enbridge now claims that neither the Line 5 replacement project nor the tunnel require Commission approval, Enbridge made the opposite representation to the State of Michigan when it negotiated the various agreements that made the project possible. Enbridge should not be rewarded for its misrepresentation.

As set forth in Enbridge’s exhibits, the company entered into certain agreements with the State of Michigan. The first agreement required Enbridge to prepare a report analyzing alternatives for replacing the existing pipes across the Straits.⁶⁸ The first of the alternatives Enbridge agreed to analyze in the report was a tunnel.⁶⁹ Enbridge prepared the alternatives report, submitted it to the State, and has also included it as Exhibit A-9 in this case. That report recommended construction of the tunnel. The second agreement references the alternatives report as the basis for pursuing

⁶⁵ Application, paragraph 43.

⁶⁶ Application, paragraph 41.

⁶⁷ Application, paragraph 41.

⁶⁸ First Agreement Between the State of Michigan and Enbridge, Exhibit A-8, paragraph I.F, p 5.

⁶⁹ *Id.*

further agreements toward the tunnel project.⁷⁰ The third agreement references the second agreement and further commits the parties to pursuing the tunnel project.⁷¹ The tunnel agreement is in the same vein.⁷²

The tunnel agreement requires Enbridge to seek all required governmental approvals and permits for the tunnel.⁷³ The alternatives report contains detailed statements about what approvals would be required for the tunnel. The alternatives report expressly states that this Commission would be one of the primary regulators of the tunnel: “The tunnel would require at least 15 state and federal permits. The primary regulators would be the U.S. Army Corps of Engineers, Michigan Department of Environmental Quality, Michigan Department of Natural Resources, and Michigan Public Service Commission.”⁷⁴ The alternatives report also contains a table in several places that states that the Commission will need to grant approval for the tunnel:⁷⁵

Construction and operation permits and approvals

Agency, Authority	Jurisdiction	Permit, Authorization, Survey or Consultation	Tunnel	Open Cut
Regulatory—State				
Michigan Public Service Commission	State	Certificate of Public Convenience and Necessity	✓	✓

In sum, all of the agreements Enbridge entered with the State of Michigan for this project highlighted the necessity and importance of obtaining key regulatory approvals as a condition for proceeding. Enbridge represented – specifically and repeatedly – that Commission approval under

⁷⁰ Second Agreement Between the State of Michigan and Enbridge, Exhibit A-10, paragraph I.F, pp 5-6.

⁷¹ Third Agreement Between the State of Michigan and Enbridge, Exhibit A-1.

⁷² Tunnel Agreement, Exhibit A-5.

⁷³ Exhibit A-5, Sections 4.1 and 4.2, p 8.

⁷⁴ Exhibit A-9, p 3.

⁷⁵ Exhibit A-9, p 25 and Appendix 5 on p 76.

Act 16 was one of those key approvals. Whether Enbridge's new position in this docket is the result of a misunderstanding, a change in plans, or an intentional deception is left for the reader to judge. In any scenario, the moving target of Enbridge's position regarding Commission approval counsels in favor of a careful, thorough, and cautious approach – and against the quick, pro forma approval Enbridge now seeks via declaratory ruling.

V. THE COMMISSION SHOULD CLARIFY AT THE OUTSET THAT THE TUNNEL IS PART OF THE LINE 5 TUNNEL REPLACEMENT PROJECT.

Finally, the Commission should take an additional step beyond simply denying Enbridge's request for declaratory ruling. The Commission should also hold that the tunnel is subject to the Commission's jurisdiction and authority under Act 16, and therefore the tunnel is part of the project and within the scope of this case. As explained in Section IV.A of these comments, the tunnel is a facility used for the transport of petroleum products. The tunnel is also a fixture used in connection with the transport of these products. The reader is referred to that earlier section for a fuller discussion of these points.

It should also be noted that the tunnel is discussed in the testimony of all three of Enbridge's pre-filed witnesses, and in Exhibits A-1, A-4, A-5, A-6, A-7, A-9, A-10, A-11, and A-12 of Enbridge's initial filing. Finally, and in the alternative, the tunnel is part of the pipeline because it would only be constructed in order to house the pipeline; and Enbridge presents the tunnel as the secondary containment system for the pipeline.⁷⁶

This request for a ruling that the tunnel is part of the project is not merely academic. By clarifying this point now, the Commission will save the parties and the Administrative Law Judge

⁷⁶ Exhibit A-9, p 14 (“Secondary containment feature”).

a great deal of time and resources that will otherwise be spent on discovery motions and motions to strike. Further, because motions to strike are typically heard during the cross-examination hearing, clarifying this issue now will provide the most efficient path to developing a full and robust record for the Commission's ultimate decision on the merits.

VI. CONCLUSION.

For the reasons discussed above, the commenters respectfully request that the Commission deny Enbridge's request for declaratory ruling; set this matter for contested case; and rule that the tunnel is part of the Line 5 project, requires Commission approval, and is therefore within the scope of this case.

OLSON, BZDOK & HOWARD, P.C.
Counsel for MEC, GTB, Watershed Council, NWF

Date: May 12, 2020

By: _____
Christopher M. Bzdok (P53094)
Lydia Barbash-Riley (P81075)

OLSON, BZDOK & HOWARD, P.C.
Co-Counsel for GTB

Date: May 12, 2020

By: _____
William Rastetter (P26170)
Tribal Attorney
Grand Traverse Band of Ottawa and
Chippewa Indians



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
GAYLORD DISTRICT OFFICE



LIESL EICHLER CLARK
DIRECTOR

May 4, 2020

VIA E-MAIL

Mr. Paul Turner
Enbridge Energy, Limited Partnership
26 East Superior Street, Suite 309
Duluth, Minnesota 55802

Dear Mr. Turner:

SUBJECT: Correction Request
Submission No. HNY-NHX4-FSR2Q
Counties: Emmet and Mackinac
Site Name: Enbridge Energy-Line 5-Straits of Mackinac

The Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (WRD), has received and reviewed your application for a utility tunnel beneath the Straits of Mackinac. Based on the review, the application has been determined to be incomplete as received and cannot be further processed until the information and edits requested below have been submitted.

EGLE requires a public notice document to explain the proposed regulated activities as concisely as possible and to be easily accessible to the public. The public notice material is intended to be published for the public to use in reviewing the proposal and offering substantive comments on the proposed project. The materials, as submitted when compiled, total over 350 pages in length and are 86 MB in size. This is a very large sized document. EGLE requests that Enbridge edit submitted materials for precision and relevance to actual proposed construction. Please eliminate items that do not apply to the proposed work, as well as, adding details where needed/requested. All Enbridge materials submitted to date will be retained in MiWaters and will continue to be accessible to the public. EGLE is not advising elimination of already submitted documents. EGLE is requesting refining of materials for appropriate public noticing.

EGLE understands that design–build process is being used by overlapping the design phase and construction phase of this project. This means that much of the exact dimensions and specifications of structures and tunnel location and design are to be determined as the project design is finalized. One example is the exact proposed tunnel inside diameter is not yet determined. Enbridge is proposing the tunnel will be approximately 18 to 21 feet in finished diameter, or other appropriate diameter determined through final design. Enbridge will be required to provide appropriate and relevant final design details to EGLE WRD as soon as designs are finalized and available.

Please consider the benefits of scheduling a conference call to discuss this correction request and EGLE comments and requested edits to Enbridge application materials. EGLE recommends that we discuss this application, its processing, and to go over the details of

Mr. Paul Turner

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implementing this application review including Enbridge future submittals of relevant design products and specifications.

Under Part 17, Michigan Environmental Protection Act, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), the department is required to assess whether there are any feasible or prudent alternatives to the tunnel project. The application should include a complete assessment of the alternatives.

On page 2 of the application attachment titled "Investing in Michigan's Future" two transportation options are mentioned but not analyzed. Please include a detailed analysis of those options and any others that are available to Enbridge.

EGLE anticipates requiring mitigation for permanent wetland impacts. Please provide a conceptual wetland mitigation plan. If permanent wetland impacts are proposed and no mitigation is offered, you must provide more than a request for wetland mitigation waiver. A commentary is required with an explanation detailing why compensatory wetland mitigation is not required.

The wetland restoration plan requires additional details. Please refer to R 281.925 (Rule 5) of Part 303, Wetlands Protection, of the NREPA for guidance.

Houghton's Goldenrod (*Solidago houghtonii*) and Dwarf Lake Iris (*Iris lacustris*), both plant species that have been separately listed by Michigan and the United States Fish and Wildlife Service as Threatened (legally protected), have been observed within the limits of disturbance on the north side of the Straits of Mackinac. Please upload a mitigation plan for the anticipated impacts to Houghton's Goldenrod and Dwarf Lake Iris.

Please provide spoil disposal information detailing, as best estimated, anticipated amounts including muck and rock that will be moved off-site and how and where this material will be both temporarily and permanently disposed of. Once designs are final please update this information.

There is known litigation involving the property with several ongoing legal challenges. On page 8 of the application there is a question asking about any known litigation involving the property. If not including known litigation information, Enbridge should explain why the still pending litigation on the validity of Act 359, the Tunnel Agreement, and the Assignment of Easement are not mentioned.

Please upload a copy of the referenced Michigan Department of Natural Resources Easement to Construct and Maintain Underground Utility Tunnel at the Straits of Mackinac.

Please upload a copy of the Straits Geotechnical Data Report (GDR). Enbridge indicated that additional laboratory testing was being completed and results of this analysis are proposed as an addendum to the GDR. As this project moves forward, please provide any additional GDR information as it is generated.

This is an effort to refine and reduce the total size and reduce number of pages to be included in the final public notice. Edits can simply be uploaded into the existing MiWaters application as an addition to already submitted materials.

Mr. Paul Turner

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Additional information and/or filing fees may be required upon further review of your application. Should we not receive the requested information from you within 30 days of this letter, we will consider your application as withdrawn and will close your application. Fees are not refundable on applications once a decision has been made or if an action has been taken, such as closing an application due to no or incomplete response to a correction request letter, posting a public notice, or conducting a site visit. A new application may be submitted, but fees are not transferable.

If you have any questions regarding this letter or your application, please contact me at 989-330-9252; or HaasJ1@michigan.gov. Most EGLE staff, including myself, are working remotely and we are attempting to complete as much as possible without going into the office. Please do not mail any work/application products to the Gaylord District Office. Please submit requested modifications as an amendment by uploading to the MiWaters site for this project and copy me at my email address. Please include Submission No. HNY-NHX4-FSR2Q in your response. The status of your application can be tracked online at <https://miwaters.deq.state.mi.us/miwaters/>.

Sincerely,



Joseph Haas, District Supervisor
Gaylord District Office
Water Resources Division

cc: Mr. Peter Holran, Enbridge
Mr. Jeff Benefiel, Stantec Consulting Services, Inc.
Ms. Katie Otanez, U.S. Army Corps of Engineers, Detroit

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the 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

U-20763

PROOF OF SERVICE

On the date below, an electronic copy of **Comments in Opposition to Request for Declaratory Ruling by Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council and National Wildlife Federation** was served on the following:

Name/Party	E-mail Address
Counsel for Enbridge Energy, Limited Partnership. Michael S. Ashton Shaina Reed	mashton@fraserlawfirm.com sreed@fraserlawfirm.com
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For Love Of Water (FLOW) James Olson	jim@flowforwater.org
Counsel for Bay Mills Indian Community (BMIC) Christopher M. Bzdok Whitney Gravelle Kathryn Tierney Debbie Chizewer Christopher Clark David Gover Matt Campbell	chris@envlaw.com wgravelle@baymills.org candyt@bmic.net dchizewer@earthjustice.org cclark@earthjustice.org dgover@narf.org mcampbell@narf.org

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.
Counsel for MEC/GTB/Watershed Council/ NWF

Date: May 12, 2020

By: _____
Karla Gerds, Legal Assistant
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