



Waganakising Odawak
Little Traverse Bay Bands of Odawa Indians
Regina Gasco Bentley, Tribal Chair
7500 Odawa Circle, Harbor Springs, Michigan 49740
Phone 231-242-1401 • Fax 231-242-1411

May 13, 2020

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

Submitted via email to mpscdockets@michigan.gov

**Re: Case No. U-20763, In Re Enbridge Energy
Comments of the Little Traverse Bay Bands of Odawa Indians in
Opposition to a Request for Declaratory Rule by Enbridge
Energy**

Dear Michigan Public Service Commission:

As Chairperson and on behalf of the Little Traverse Bay Bands of Odawa Indians (Tribe) I express staunch opposition to the Request of Enbridge Energy to proceed with relocation of its Line 5 pipeline to a tunnel that it would construct under the Straits of Mackinac. Enbridge's assertion that it may rely on a 1953 easement to now evade the MPSC's permitting process for this massive potentially catastrophic project is incredulous. Our Tribe fully endorses and incorporates by reference the attached legal analysis of the Bay Mills Indian Community.

The Little Traverse Bay Bands of Odawa Indians consists of descendants of the Odawa that inhabited villages from Charlevoix to Cross Village, the Beaver Islands and the north shore of Lake Michigan before the arrival of Europeans. We have fished northern Lake Michigan and especially the Straits of Mackinaw for subsistence and commerce (Odawa means trader) since time immemorial. Our exercise of subsistence and commercial fishing rights reserved in the Treaty of 1836 and affirmed by the Federal Court in the *U.S. v MI* case remain central to our culture, economy, and physical and spiritual well-being. The Straits of Mackinac are the life blood of our Tribe. An oil spill or geologic mishap from tunneling under the Straits would devastate our Tribe beyond

any economic valuation.

For these reasons as supported by the Bay Mills Indian Community's legal analysis you must deny Enbridge Energy's request for a declaratory ruling.

Respectfully,

\s\ Regina Gasco-Bentley

Tribal Chairperson

Enclosure: Comments of the Bay Mills Indian Community Regarding the Request for a Declaratory Ruling by Enbridge Energy, Limited Partnership

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 OF BAY MILLS INDIAN COMMUNITY OPPOSING THE REQUEST FOR A
DECLARATORY RULING BY ENBRIDGE ENERGY, LIMITED PARTNERSHIP**

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I. INTRODUCTION

The Gnoozhkekaaning, “Place of the Pike,” or Bay Mills Indian Community (“Bay Mills”), through its undersigned counsel, respectfully submits these comments to the Michigan Public Service Commission (“the Commission”) opposing the request for a declaratory ruling by Enbridge Energy, Limited Partnership (“Enbridge”).

On April 17, 2020 Enbridge filed an application, pursuant to 1929 PA 16; MCL 483.1 *et seq.* (“Act 16”) and Michigan Administrative Code, R 792.10447 (“Rule 447”), requesting approval to replace and relocate the segment of Line 5 crossing the Straits of Mackinac into a tunnel to be constructed beneath the Straits of Mackinac (the “Line 5 Project” or the “Project”). In the alternative, Enbridge asks this Commission for a declaratory ruling that its application does not need to proceed through the approval process because, according to Enbridge, it already has the requisite authority for the Line 5 Project based on this Commission’s grant of authority for the construction of Line 5 in 1953. By its April 22, 2020 Order, the Commission requested comments on the request for a declaratory ruling.

The Commission’s mandate and commitment to regulate and protect the public requires that Enbridge’s request for a declaratory ruling be denied. The request must be denied for three reasons:

(1) The request lacks any legal basis and runs counter to the Commission’s regulations and rulings;

(2) The request requires the Commission to ignore the requirement that it consider the environmental impacts of the Line 5 Project; and

(3) The request would deprive Bay Mills and other impacted tribes the opportunity to participate in the proceedings, where they would raise substantial concerns about the Line 5 Project under the standards set forth in Public Act 16 and the Michigan Environmental Protection Act (“MEPA”).

II. BAY MILLS INDIAN COMMUNITY’S INTEREST

Bay Mills has a long-standing and critical interest in the waters of the Great Lakes, the Straits of Mackinac and the surrounding region. Bay Mills is one of the signatories to the 1836 Treaty of Washington, which ceded territory to the United States for the creation of the State of Michigan. In exchange for the agreement to cede the territory to the United States, the Tribes reserved the right to hunt and fish throughout the territory--including in the Great Lakes and the Straits of Mackinac. The 1836 Treaty is a legally binding agreement between sovereign nations that acknowledges and establishes respective political and property relations as well as confirms each nation’s rights and privileges.¹ And, under Article Six of the United States Constitution, the Treaty of 1836 is to be considered the “supreme law of the land.” It remains as operative today as the day it was signed.

The right to fish has been fiercely protected by the Bay Mills Indian Community and other tribes, including through litigation that resulted in critical legal decisions upholding that right.² Bay Mills defends its legal right because the right to fish, and the need for a natural environment in which fish can thrive, is of the utmost importance to the tribe and its members.

¹ See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699, 203 L.Ed. 2d 846 (2019) (A treaty is “essentially a contract between two sovereign nations.”)

² See *People v. LeBlanc*, 399 Mich. 31, 248 N.W. 2d 199 (1976) and *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

Consistent with the tribes' legal right to fish, the State of Michigan and the signatory tribes to the 1836 Treaty entered into a consent judgment in 1985 regarding management of the Great Lakes fishery. That agreement affirmed that the State and the Tribal Nations must work together to protect the Tribal Nations' treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. The Tribal Nations and the State have worked together to protect the Great Lakes ever since.

The Great Lakes and the Straits of Mackinac also have profound cultural significance to Bay Mills. According to the oral histories of the tribe, the creation of North America began with a flooded Earth. The animals that survived that Earth received instructions from the Creator to swim deep beneath the water and collect soil that would be used to recreate the world. All of the animals failed, but the body of the muskrat, the last animal that tried, resurfaced carrying a small handful of wet soil in its paws. According to the history, the Creator used the soil collected and rubbed it on the Great Turtle's back, forming the land that became known as Turtle Island, the center of creation for all of North America.

It is believed that the Great Turtle emerged from the flood in the Straits of Mackinac. Because the creation of North America took place in the Great Lakes, the Great Lakes are considered the heart of Turtle Island and as such, the heart of North America. The word "Mackinac" is, in fact, derived from the original name of the Great Turtle from the Ojibwe story of Creation.

Bay Mills has significant concerns about Enbridge's proposal to construct a tunnel under the lakebed of the Straits of Mackinac and has filed with the Commission a petition to intervene

in this matter as a party. Bay Mills believes that a full contested case process is essential to protect the rights of interested parties and long-term decisions arising from this application.

III. COMMENTS

“The decision to issue a declaratory ruling is within the discretion of the Commission.”³ Under Rule 448, “[a]ny person may request a declaratory ruling as to the applicability to an actual state of facts 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.” Here, a declaratory ruling is not appropriate because the facts are evolving and in dispute.⁴ For this reason, and for the additional reasons discussed below, Bay Mills respectfully requests that the Commission exercise its discretion to deny Enbridge’s request for a declaratory ruling.

A. The request for a declaratory ruling should be denied because a full permit approval process is required under the law.

Act 16 invests this Commission with the authority to control, regulate and investigate the transportation of petroleum products.⁵ In doing so, the Commission strives to “protect the public by ensuring safe, reliable and accessible energy.”⁶ By mischaracterizing the scope of the project and omitting key facts about its agreements with the State of Michigan, Enbridge attempts to distract the Commission from one simple truth: the Commission’s legislative mandate, as reflected in the Commission’s rules and established criteria, requires that the Commission thoroughly vet Enbridge’s proposed construction of a new pipeline and tunnel.

³ See Rule 448 of the Michigan Public Service Commission’s Rules of Practice and Procedure, R 792.10448.

⁴ In the matter of the petition by Consumer Energy Company for a request for a declaratory ruling related to PPA auction process, MPSC Case No. U-11811 (denying a request for a declaratory ruling because critical facts were unknown).

⁵MCL 483.3.

⁶MPSC Mission Statement at <https://www.michigan.gov/mpsc/0,9535,7-395-93218---,00.html>

1. Enbridge's description of the project and the associated permit requirements is misleading.

Enbridge's request for a declaratory ruling is based on a fundamental mischaracterization of the scale and scope of the Line 5 Project. In an effort to piggyback on an approval process that occurred 67 years ago, Enbridge characterizes the current Proposal as a "modest" relocation and a "maintenance-based" replacement that will be located "very close" to the dual pipelines that currently run through the Straits of Mackinac. (Enbridge's Application, p. 16-17.) By minimizing what is involved and what is at stake, Enbridge argues that the work involved in the Line 5 project is consistent with what was initially approved in 1953.

Nothing could be further from the truth. The Line 5 Project is massive in scale, involving the replacement of two 20" pipelines with one 30" pipeline and the relocation of this segment of the pipeline in a tunnel to be constructed underneath the lakebed of the Straits of Mackinac. Such a tunnel has never before been constructed and, therefore, there are serious questions about its viability and the massive impact it will have on the environment. It is absurd to suggest that a project of this type was somehow contemplated by, or included in, the grant of authority issued in 1953.

Enbridge's attempts to downplay the scope and significance of the Line 5 Project do not instill confidence in its plans to take the requisite care in this risky and complex plan. At the same time that the Line 5 Project siting approvals are pending before the Commission, several other approvals are pending before the Michigan Department of Environment, Great Lakes and Energy ("EGLE") and the United States Army Corps of Engineers. Notably, in the context of reviewing

Enbridge's joint permit application before EGLE and the Corps, EGLE sent a letter to Enbridge on May 4, 2020 pointing out a number of major gaps in Enbridge's joint permit application.⁷

Furthermore, Enbridge's attempt to exclude the tunnel from this permit analysis runs counter to the letter and spirit of the tunnel agreements it reached with the State of Michigan. The tunnel agreements do not supplant the need for permits, but, instead, recognize that Enbridge must seek all required governmental approvals and permits for the tunnel.⁸ Further, Enbridge's own alternatives analysis report, in support of the tunnel agreement, lists the MPSC permit as a requirement for it to proceed with the tunnel project.⁹ At that time, Enbridge did not inform the State that it would seek a declaratory ruling to bypass the Commission's regulatory authority.

2. No legal authority supports Enbridge's request.

Enbridge offers no legal authority for its position. Instead, it baldly asserts that it should not have to comply with the Commission's rules because the rules makes no reference of applications for "segment-replacement projects." (Enbridge Application, p. 17.) Enbridge seems to suggest that, because it is not proposing to change the location of the beginning or end of the pipeline, it somehow has carte blanche to do whatever it wants in between.

Enbridge's position that it should get a "free pass" on the approval process for its proposed re-routing of a "segment" of Line 5 should be rejected because it is inconsistent with the broad regulatory authority granted to the Commission in Act 16 to "control, investigate and

⁷ EGLE May 4, 2020 Letter, Attachment A.

⁸ See Tunnel Agreement between the Mackinac Straits Corridor Authority and Enbridge, attached to Enbridge's Application as Exhibit A-5.

⁹ See Alternatives Report, attached to Enbridge's Application as Exhibit A-9, p. 3.

regulate” the business of transporting crude oil and petroleum products.¹⁰ Furthermore, Enbridge’s request directly contradicts the requirements of Rule 447 of the Commission’s Rules of Practice and Procedure, which provides that a corporation must file an application and obtain Commission approval if it “wants to construct facilities to transport crude oil or petroleum products.”¹¹ The proposed pipeline *and* tunnel are clearly facilities that are used to transport petroleum products. Thus, the Line 5 Project falls squarely within the ambit of Rule 447.

Enbridge tries to circumvent this requirements of Rule 447 by characterizing the Line 5 Project as not new, but, instead, a modification to an existing pipeline. But, Rule 447 does not make the distinction that Enbridge draws. Rule 447 requires an application for all facilities and it certainly does not include an exemption for the construction of a massive tunnel underneath the lakebed that is designed to house a wholesale rerouting of an existing pipeline in a different location.

3. The changed siting of Line 5 requires a contested case process.

Enbridge’s reliance on the 1953 easement is at odds with the MPSC’s criteria for evaluating proposed facilities and construction. The MPSC’s standards for granting an Act 16 certificate are well-established:

Generally, the Commission will grant an application pursuant to Act 16 when it finds that (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, and (3) the construction of the pipeline will meet or exceed safety and engineering standards.¹²

¹⁰ MCL 483.3.

¹¹ See Rule 447(1)(c) of the Commission’s Rules of Practice and Procedure.

¹² See Order of the MPSC, Case No. U-17020.

A contested case process will enable the Commission to evaluate all of these factors, including the dramatic change to the pipeline's location. When evaluating the reasonableness of a proposed design and route, the Commission has explained that it will examine the proposed route and consider its impact on humans and the environment.¹³ And, this focus on the specific location of a proposed project and the impact it will have at that location, is long-standing. In the 1953 Order, the Commission approved the pipeline "over the route as hereinbefore described."¹⁴ In fact, the specific location was so important that the Lakehead Pipe Line Company had to obtain a modification to the original 1953 easement when it realized that it had to change the "Easterly Center Line" identified in the original easement.¹⁵

Location matters in these proceedings. Nothing about the construction of a tunnel to house a new pipeline in a new location was contemplated in the 1953 easement. Indeed, the 1953 easement specifically requires the Commission's renewed approval for any relocation or replacement of the pipeline.¹⁶ Thus, the Line 5 project was not previously approved by the Commission and Enbridge does not have authority to proceed with the current project based on the 1953 easement or its amendment.

4. Pending litigation over the 1953 easement and the State's ongoing obligations under the public trust doctrine make a declaratory ruling inappropriate.

Finally, Enbridge's reliance on the 1953 easement for a permit waiver in this matter should be rejected because the validity of the 1953 easement has been challenged in pending legal proceedings involving Line 5. On June 27, 2019, Michigan's Attorney General filed suit in the

¹³ See Act 16 Siting Process Overview, Michigan Public Service Commission, April 1, 2020, Attachment B, p. 2.

¹⁴ See March 31, 1953 Order of the MPSC Approving Line 5, submitted with Enbridge's Application as Exhibit A-3.

¹⁵ See 1953 Amendment to Straits of Mackinac Pipe Line Easement, attached to Enbridge's Petition as Exhibit A-2.

¹⁶ 1953 Straits of Mackinac Pipe Line Easement, paragraph E, p.8, attached to Enbridge's Petition as Exhibit A-2.

Circuit Court of Ingham County alleging that the continued operation of Line 5 in the Straits of Mackinac violates the public trust and constitutes a public nuisance under Michigan common law and the Michigan Environmental Protection Act¹⁷. Notably, the Attorney General argues, *inter alia*, that the 1953 easement that allowed for the construction of the pipeline in the Straits was void from its inception because there were no contemporaneous factual findings that the easement would improve navigation or another public trust interest, or that the easement could be conveyed without impairment of the public trust. In the suit, the Attorney General requests an injunction to cease operation of Line 5 in the Straits and permanently decommission it. Because this matter is still pending, the most prudent course of action in this matter is to reject Enbridge's request to rely on a 67-year old easement whose validity has been called into question by the state's highest ranking legal officer.¹⁸

Furthermore, the public trust doctrine, which provides one of the legal bases for the Attorney General's conclusion that the 1953 easement is invalid, also supports the conclusion that Enbridge's request for declaratory relief should be denied. Under the public trust doctrine, the state, as sovereign, acts as trustee of public rights in the navigable waters, including the Great Lakes.¹⁹ When the state conveys rights in the Great Lakes to a private party like Enbridge, that

¹⁷ Previously, In March 2019, the Attorney General issued an opinion stating that the law enacting the controversial tunnel plan was unconstitutional. Consistent with that opinion, Governor Gretchen Whitmer ordered all state agencies to halt all activities with respect to the tunnel. In response, Enbridge filed suit in Michigan's Court of Claims seeking to establish the validity and enforceability of the agreements it had reached with the State of Michigan. The Court of Claims ruled in favor of Enbridge, but the Attorney General appealed and the matter is now pending before the Michigan Court of Appeals.

¹⁸ See *In the matter of Consumers Energy Company's request for a declaratory ruling concerning the provisions of gas transportation to the Midland Cogeneration Venture Limited Partnership*, MPSC Case No. U-17962 (denying request for declaratory ruling because of pending litigation) and *In the matter of the application of Consumer 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*, MPSC Case No. U-10833 (same).

¹⁹ *Glass v. Goeckel*, 473 Mich. 667, 673-74, 703 N.W.2d 58 (2005), citing *Central R. Co. v. Illinois*, 146 U.S. 387, 435, 13 S.Ct. 110, 36 L.Ed. 1018 (1892) and *Nedtweg v. Wallace*, 237 Mich. 14, 16-23, 208 N.W. 51 (1926).

conveyance is subject to the State's obligation to protect and preserve the public's rights in the Great Lakes for fishing, hunting and boating.²⁰ The state never has the power to eliminate the public's rights.²¹ Thus, the public trust doctrine imposes on the State a continuing obligation to preserve and protect the public's rights in the waters of the Great Lakes. That obligation can only be satisfied in this instance if the Line 5 Project is thoroughly vetted to determine its effect on the public's rights. For this reason, the request for declaratory relief must be denied.

B. The request for a declaratory ruling should be denied because the Commission must consider the environmental impacts under the Michigan Environmental Protection Act.

The Commission cannot grant Enbridge's request without circumventing the requirement that the Commission consider whether the proposed project complies with the Michigan Environmental Protection Act ("MEPA").²² MEPA states, in part:

In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.²³

Courts have recognized, and this Commission has acknowledged, that this language imposes on the MPSC a requirement to consider the impact proposed projects will have on the environment.²⁴

²⁰ See *Glass*, 473 Mich. at 678-81.

²¹ *Id.* at 680-81

²² See MCL 324.1701-.1706

²³ See MCL 324.1705.

²⁴ See, e.g., *Buggs v. Michigan Public Service Commission*, 2015 WL 159795 (Jan. 13, 2015) at *6-7; see also Order of the MPSC, Case No. U-20634, Dec. 19, 2019, pp. 7-8; and, Act 16 Siting Process Overview, Michigan Public Service Commission, April 1, 2020, Attachment B, p. 2).

The need for a comprehensive environmental analysis under MEPA further demonstrates why Enbridge's reliance on the 1953 approval is misplaced. The Commission's decision in 1953 long predates the enactment of MEPA in 1970. The type of environmental impact analysis that is required today was not required then. Michigan law now requires that the Line 5 Project undergo environmental scrutiny and Enbridge's request must, therefore, be denied.

Considering that Enbridge claims that the Line 5 Project will promote environmental protection, an environmental analysis is particularly important in this matter. Enbridge asserts that relocating the tunnel will protect the aquatic environment and eliminate the risk of an anchor strike in the Straits of Mackinac that could result in a catastrophic oil spill.²⁵ Because it lies at the very heart of the justification for the project, Enbridge's claim that the Project will protect the aquatic environment warrants an in-depth, critical analysis under the requirements of MEPA. And, MEPA also requires that the Commission examine the impact the construction itself will have on the aquatic environment and the surrounding air, land, water and wildlife, as well as on Bay Mills' federally protected treaty fishing rights and resources. It is not hard to imagine that drilling a massive tunnel into the lakebed of the Straits of Mackinac will have significant consequences.

Bay Mills is also concerned about the condition of the inland portions of Line 5, especially at water crossings and where the Line comes in close proximity to the Great Lakes. Approving this application, without full environmental review or full knowledge of the condition of Line 5 within Michigan, blindly perpetuates the risks that Line 5 poses to hundreds of Michigan's aquatic

²⁵ See Enbridge Application, p. 12; see also Pre-Filed Direct Testimony of Amber Pastoor, p.3 line 25 to p.4 line 2 ("The purpose of the Project is to alleviate an environmental concern to the Great Lakes....")

ecosystems. A contested case process is the appropriate mechanism to evaluate the environmental consequences of constructing a tunnel that would result in the continued reliance on the pipeline.

If given the opportunity to participate as an intervening party in the contested case process, Bay Mills intends to offer testimony and evidence about, *inter alia*, the unique ecosystem in and surrounding the Straits of Mackinac. Before approving this Line 5 Project, the Commission should evaluate the impacts of the project on threatened and endangered species, including the threatened Houghton's Goldenrod and Dwarf Lake Iris. The Commission must also consider the project's permanent wetland impacts. Notably, Enbridge's failure to address these concerns prompted the EGLE and the Army Corps of Engineers to deem Enbridge's joint permit application incomplete.²⁶

Since 1953, we have become acutely aware of the disastrous impact that oil spills can have on our environment. And we have become aware of Enbridge's own troublesome record with respect to safety and transparency. In 2010, a failure in the Enbridge pipeline system resulted in the worst inland oil spills in our nation's history—releasing 800,000 gallons of oil into the Kalamazoo River System. Moreover, in 2017, Enbridge acknowledged that its maintenance activities damaged Line 5. Most recently, in September 2019, in the process of conducting geological work for the Line 5 tunnel, Enbridge got a drill rod stuck and did not report it to EGLE for two months. This record suggests that any proposal by Enbridge requires careful scrutiny with the benefit of a modern understanding of the dangers and risks posed by this type of construction project.

²⁶ See Attachment A.

The current understanding of climate change and the need to reduce our reliance on fossil fuels are also important environmental concerns for the Commission to consider in evaluating the need for the Line 5 Project. Indeed, Governor Whitmer has issued an Executive Directive which commits the State of Michigan to lowering its greenhouse gas emissions by at least 26-28% below 2005 levels by 2025.²⁷ Because none of these modern considerations were part of the 1953 approval process, the Commission should deny Enbridge's request for declaratory relief.

An examination of all of these environmental considerations and consequences are part of the Commission's legislative mandate under MEPA and Bay Mills has valuable information relevant to that mandate. Enbridge's request for a declaratory ruling should, therefore, be denied to permit Bay Mills to present this information in a contested hearing.

C. The request for a declaratory ruling should be denied because granting the ruling would deny Bay Mills and other tribes the opportunity for meaningful consultation and to present concerns to the Commission in a contested case hearing.

Bay Mills has grave concerns about the Line 5 Proposal and has sought permission to participate in this matter as an intervening party. There is no doubt that Bay Mills—along with several other Tribal Nations—has a protected legal interest, under the 1836 Treaty of Washington, in the fishery resource in the upper Great Lakes, including in the waters of the Straits of Mackinac.²⁸ Bay Mills has worked cooperatively with the State of Michigan to manage the Great Lakes fishery for the past thirty years.

Bay Mills has diligently attempted to protect its legal interest in the public proceedings surrounding Line 5 and the proposal to construct a tunnel under the Straits of Mackinac. In

²⁷ Executive Directive, 2019-12, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-488740--,00.html

²⁸ See generally *United States v. State of Mich.*, 471 F. Supp. 192, 216 (W.D. Mich. 1979).

February 2018, Bay Mills wrote to then Governor Snyder to express its concerns about the agreement the State of Michigan was negotiating with Enbridge.²⁹ In that letter, Bay Mills expressed its frustration that the State was reaching agreements with Enbridge about the continued operation of Line 5 without any consultation with, or input from, Bay Mills and the other treaty Nations. In April, 2019, Bay Mills submitted comprehensive comments to the United States Army Corps of Engineers in response to Enbridge's permit application to install anchors to secure the portion of Line 5 that currently runs through the Straits of Mackinac. Then, in May 2019, Bay Mills wrote to Governor Whitmer to again express its concern about Line 5 and the proposed new tunnel.³⁰ In that letter, Bay Mills requested access to important information about Enbridge's operations and negotiations with the State that relate to the tribe's ability to protect its interest. In short, even though it has been excluded at many key decision points, Bay Mills has repeatedly asserted and defended its legal interest.

Now, Enbridge's request for a declaratory ruling once again threatens Bay Mills' ability to assert and protect its legal interest. By bypassing the contested case process, Enbridge would deprive Bay Mills of the opportunity to participate in these proceedings as a party. Such a result is contrary to basic notions of fairness and this Commission's recognition of the importance of tribal involvement and consultation in matters considered by the Commission.³¹ Furthermore, granting the requested declaration would contravene Governor Whitmer's directive to state agencies to engage in meaningful consultation with the federally recognized Indian tribes before

²⁹ See Letter to Governor Snyder, Feb. 7, 2018, Attachment C.

³⁰ See Letter to Governor Gretchen Whitmer, May 10, 2019, Attachment D.

³¹ See Act 16 Siting Process Overview, MPSC, April 1, 2020 ("Tribal Consultation and Involvement") (describing the ability of tribes to participate in Act 16 siting proceedings by filing a petition to intervene). To the best of its knowledge, neither Bay Mills nor any other signatory to the 1836 Treaty of Washington was consulted about the decision to allow the pipeline to be constructed on the lakebed beneath the Straits of Mackinac.

taking an action that may affect the tribes.³² It is beyond dispute that Bay Mills has a legal interest in the waters that are affected by Enbridge’s proposed activity. There is no reason why Enbridge should be permitted to use a 67-year old decision to deprive Bay Mills of the opportunity to be heard in this matter.

Indeed, other tribes and the public at large should be provided with the opportunity to participate in this matter. As the Commission noted at the initial hearing, this matter has generated considerable interest and attention from the public, despite the challenges to public participation presented by the COVID-19 pandemic. In consideration of the serious and substantial impact of COVID-19 on tribal communities, Bay Mills President Bryan Newland—who sits on the Michigan Advisory Council on Environmental Justice—sent a letter to Governor Whitmer requesting a pause on all tunnel permit processes.³³ In addition to the disruption of COVID-19, Enbridge’s continued operation of Line 5 and its proposal to construct a tunnel under the Straits of Mackinac have generated numerous legal proceedings in federal and state courts and administrative agencies.³⁴ Given the significant public interest in this matter, Bay Mills respectfully requests that the Commission deny Enbridge’s request for a declaratory ruling so that all interested parties can have the opportunity to present their arguments and evidence to the Commission.

³² See Executive Directive No. 2019-17 of Governor Gretchen Whitmer, Oct. 31, 2019, Attachment E.

³³ See Bay Mills Letter to Governor Whitmer, Apr. 3, 2020, Attachment F.

³⁴ See, e.g., *United States v. Enbridge Energy*, No. 1:16-cv-914 (W.D. Michigan); *Bad River Band v. Enbridge*, No. 3:19-cv-00602 (W.D. Wisconsin); *Nessel v. Enbridge*, No. 19-474-CE (Ingham County Cir. Ct. Michigan); *Enbridge v. State of Michigan*, No. 351366 (Michigan Court of Appeals); and, *In the Matter of Petitions of Straits of Mackinac Alliance, et al*, No. 18-010802, Michigan Office of Administrative Hearings and Rules.

CONCLUSION

Regulating the transportation of petroleum products in a manner that protects the public requires a full, fair and deliberate consideration of the massive construction project proposed by Enbridge. The stakes are simply too great to allow Enbridge to bypass the critical application review process conducted by this Commission. The request for a declaratory ruling should, therefore, be denied.

Furthermore, Bay Mills agrees with the joint comments submitted to the Commission by the Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council and National Wildlife Federation.

Respectfully submitted,

Counsel for Bay Mills Indian Community

Christopher M. Bzdok (P53094)
chris@envlaw.com
OLSON, BZDOK & HOWARD, P.C.
420 E. Front St.
Traverse City, MI 49686

BAY MILLS INDIAN COMMUNITY
Attn: Legal Department
12140 West Lakeshore Drive
Brimley, MI 49715

Kathryn Tierney (P24837)
candyt@bmic.net

Whitney Gravelle (P83217)
wgravelle@baymills.org