



## ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

May 13, 2020

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

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

**Comments and Objections to the Request for Declaratory Ruling by the  
Environmental Law & Policy Center and Michigan Climate Action Network**

**Proof of Service**

Sincerely,

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Margrethe Kearney  
Environmental Law & Policy Center  
mkearney@elpc.org

cc: Service List, Case No. U-20763

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**STATE OF MICHIGAN  
MICHIGAN PUBLIC SERVICE COMMISSION**

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In the matter of <b>Enbridge Energy, Limited</b>	)	
<b>Partnership's</b> declaratory request that it has	)	
the requisite authority needed from the	)	Case No. U-20763
Commission for the proposed Line 5 pipeline	)	
Project.	)	

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**COMMENTS AND OBJECTIONS  
TO THE REQUEST FOR DECLARATORY RULING  
  
BY THE ENVIRONMENTAL LAW & POLICY CENTER  
AND MICHIGAN CLIMATE ACTION NETWORK**

May 13, 2020

## **I. INTRODUCTION**

The Environmental Law and Policy Center (“ELPC”) and Michigan Climate Action Network (“MICAN”) (collectively, “ELPC *et al.*”) hereby file Comments<sup>1</sup> regarding Enbridge Energy, Limited Partnership’s (“Enbridge Limited Partnership” or the “Company”) request for a declaratory ruling pursuant to Mich. Admin Code, R 792.10448 (Rule 448) and Section 63 of the Administrative Procedures Act of 1969, MCL 24.263. The Company asks the Michigan Public Service Commission (“MPSC” or Commission”) to declare that the Company already has the requisite authority needed from the Commission for its new Line 5 Tunnel Project based on the Commission’s grant of authority for siting of the original Line 5 in its 1953 Order to the Lakehead Pipeline Company.<sup>2</sup> The Commission should deny Enbridge Limited Partnership’s request because the Company’s construction of a new tunnel and pipeline in the Mackinac Straits does not fall within the scope of the Commission’s 1953 Order and requires a separate application.

## **II. BACKGROUND**

Enbridge Limited Partnership requests siting authority for a new segment of pipeline, in a yet-to-be-constructed tunnel, hundreds of feet below the lakebed of the Straits of Mackinac. The application is apparently Enbridge Limited Partnership’s response to the clear need to end the unsustainable operation of the 67-year-old oil pipelines lying unprotected in the Straits. Almost 70 years ago, on March 31, 1953, the MPSC issued an Opinion and Order approving an application from the predecessor of Enbridge Limited Partnership’s ultimate parent company, Enbridge Inc.,<sup>3</sup>

<sup>1</sup> ELPC *et al.*’s failure to comment on any portion of the Interim Order should not be construed as agreement with that portion of the Interim Order. Nor should ELPC *et al.*’s failure to raise any issue in these Comments be construed as waiver of any claim with respect to that issue.

<sup>2</sup> March 31, 1953 order in Case No. D-3903-53.1. *See also*, Exhibit A-3 to Enbridge Limited Partnership’s application.

<sup>3</sup> ELPC *et al.* does not distinguish in this filing between Enbridge Energy Partners and its ultimate parent company or predecessors in interest. ELPC *et al.* is without sufficient

requesting approval of the location and construction of what is now referred to as the “Line 5” pipeline. This pipeline originates in Superior, Wisconsin, and runs through Michigan’s Upper Peninsula to the Mackinac Straits. When it reaches the Straits, the 30-inch-diameter pipeline splits into two 20-inch-diameter pipelines that lay across the lakebed connecting the peninsulas, just over a mile west of the Mackinac Bridge. (Application at 7). When these twin pipelines reach land, they once again become a single, 30-inch-diameter pipeline that travels through the Lower Peninsula until exiting Michigan at the international border near Marysville, Michigan. (Application at 5).

The Commission’s 1953 Order approved a very specific pipeline in a very specific place. The 1953 Order included a recitation of the physical specifications of the pipeline, as well as an approximate map of the pipeline, to be supplemented by a detailed map after completion. The thickness of the pipe, maximum allowable working pressure, minimum cover, coating, and reinforcement are all specified in the Order, with further reference to and incorporation of Enbridge Limited Partnership’s detailed 1953 application. (Ex. A-6). The Order requires a design “in accordance with conservative pipe line practices,” which are practices of the 1950s. (Ex. A-3 at 6). The Opinion also references applicable Code in effect in the 1950s. (Ex. A-3 at 6). And, of course, the 1953 application was considered only in the context of state and federal laws that existed in 1953.

Enbridge Limited Partnership now seeks to “replace” the portion of the pipeline that runs through the Straits of Mackinac along the lakebed. Enbridge Limited Partnership does not intend to “replace” the existing line in the same location, or even “replace” the existing line at some short

information to offer a legal opinion regarding the corporate history and succession of liabilities of what is now known as Enbridge Inc.

distance to the west or east. Rather, Enbridge Limited Partnership seeks to “replace” the existing 20-inch-diameter twin lines with a single 30-inch-diameter line in a 10-foot-diameter tunnel that the Company intends to build at a depth of 60 to 250 feet beneath the lakebed in a location approximately one half mile west of the existing pipeline. (Application at 2, 7, 8). The new pipeline that runs through the tunnel will then require 0.4 to 0.8 miles of new pipe to connect to the existing on-land pipeline. (Application at 10).

### **III. APPLICABLE STATUTORY PROVISIONS**

Enbridge Limited Partnership seeks declaratory judgment under Section 63 of the Administrative Procedures Act of 1969, MCL 24.263, and R 792.10448. The decision to issue a declaratory ruling is within the discretion of the Commission.” *In the Matter of the Request Filed by Mark P. Donaldson for Declaratory Ruling*, No. U-17883, 2015 WL 4934617, at \*1 (Aug. 14, 2015). The Commission has rejected requests for declaratory ruling where the request is an “attempt to end run around the issues.” *In the Matter of Consumers Energy Company’s Request for Declaratory Ruling Concerning the Provisions of Gas Transportation to the Midland Cogeneration Venture Ltd. P’ship Pursuant to Contracts Executed Under 1929 Pa 9, As Amended*, No. U-17962, 2015 WL 6592228, at \*1 (Oct. 27, 2015).

Siting authority for crude oil and petroleum product pipelines is granted under Public Act 16, MCL 483.1 *et seq.*, which grants the Commission broad powers and authority to regulate a proposed pipeline, including the ability to address public interest and public safety concerns raised by an applicant’s proposal. *See In Re Wolverine Pipe Line Co.*, No. U-12334, 2001 WL 306697 (Mar. 7, 2001). Pipeline companies “shall not have or possess the right ... to locate, maintain, or operate [their] pipe lines, ...or have or possess the right of eminent domain,” except pursuant to Act 16. MCL 483.1; MSA 22.1341. *Id.* In implementing Act 16 through Rule 447, the Commission

is clear that any company “that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products” must file an application with the Commission and receive prior approval. Mich. Admin. Code R. 792.10447. The breadth of the Commission’s authority to regulate pipelines under Act 16 is reinforced by the case cited most by Enbridge Limited Partnership in its application: *Lakehead Pipeline Company v. Dehn*, 340 Mich 25, 64 NW2d 903 (1954). In *Dehn*, the Michigan Supreme Court found that Act 16 granted the Commission authority to review and approve proposed pipelines, and to place conditions on their operations, and that the legislative basis for Act 16 was to ensure that Commission authority was exercised “for a public use benefitting the people of the State of Michigan.” *Id.* at 910.

In order to grant an application pursuant to Act 16, the Commission must find 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 current safety and engineering standards.

The Commission must also determine if there are environmental impacts from the proposed project and whether those can be appropriately mitigated. *State Hwy Comm v. Vanderkloot*, 329 Mich 159, 185-87; 220 NW2d 416, 428 (1974).

#### **IV. THE COMMISSION MUST DENY ENBRIDGE LIMITED PARTNERSHIP’S REQUEST FOR DECLARATORY JUDGMENT**

The Commission must deny Enbridge Limited Partnership’s request for declaratory judgment for two reasons: **First**, because the Company’s proposed project is new construction and requires an application and approval under Act 16; and **Second**, the Commission should exercise its discretion to deny declaratory judgment because any prior evaluation of public need is no longer applicable to this new pipeline project.

**A. Enbridge Limited Partnership's Proposed Project Is New Construction,  
Not Maintenance and Continuing Operation**

The Commission must deny the declaratory request because the proposed pipeline is not a mere maintenance and continuing operation of the existing pipeline. Enbridge Limited Partnership argues that replacing and relocating this one segment “falls squarely within the scope of the Commission’s prior approval to maintain and operate Line 5.” (Application at 16). Rule 447 requires persons or entities conducting oil pipeline operations to file applications specifically for “proposed new construction or extension” of facilities. Rule 447 states that a corporation, association, or person conducting oil pipeline operations within the meaning of Act 16 must file an application with the commission for the necessary authority to do so. Mich. Admin. Code R. 792.10447.

The proposed pipe segment requires a new Act 16 application because it clearly differs from the existing pipeline in location, in size, and in the nature of the project. The new construction is not in the same location as the existing pipeline, nor even within the general proximity, but rather is located approximately half a mile to the west. Significantly, the pipeline will no longer be sited on the lakebed of the Straits. Enbridge Limited Partners will construct a tunnel 60 to 250 feet below the bedrock of the Straits as a means of housing the new pipeline. The new Commission could not have determined in the 1953 Order that a pipeline sited within a ten foot concrete tunnel underneath the Straits of Mackinac is designed and routed in a reasonable manner. The proposed new pipeline also differs from the existing pipeline in the size and number of pipes. The new construction is a single 30-inch diameter pipe meant to “replace” two 20-inch diameter pipes. (Application at 2). Enbridge Limited Partnership also proposes to tie-in, operate, and maintain approximately 0.4 to 0.8 miles of pipe to connect the new pipe segment to Enbridge Limited Partnership’s existing Line 5 on both sides of the Straits. *Id.* The nature of the new construction

differs from the original project, and will include associated fixtures, structures, systems, coating, cathodic protection and other protective measures, equipment and appurtenances relating to the new pipe segment and connection to the existing Line 5 pipeline on both sides of the Straits. *Id.* One of these “protective measures” is a ten foot diameter, four-mile long, concrete tunnel located 60 to 250 feet below the lakebed of the Straits that will require nearly two million labor staff-hours to be built. (Application at 12). Enbridge Limited Partnership estimates that the tunnel will take five to six years to build at a cost of \$350 to \$500 million. (Ex. A-9), p. 14. Such a massive undertaking can in no respect be considered “maintenance.”

Commission precedent does not support treating Enbridge Limited Partnership’s proposed project as mere maintenance and operation. Enbridge Limited Partnership provides no support for its broad assertion that the Commission “has never taken the position that such maintenance-based replacements require Commission approval.” (Application at 16). Enbridge Limited Partnership claims that “the activity contemplated by Enbridge” in its application has *never* been considered activity that requires a new siting application. (Application at 16). In this, Enbridge Limited Partnership is correct, because *never before* has any party proposed building a four mile tunnel below the Straits of Mackinac for the purposes of siting a pipeline, and then attempted to argue to the Commission that such a huge construction project was mere maintenance and operation. The unique nature of Enbridge Limited Partnership’s enormous request only reinforces the fact that the project is not mere maintenance and operation of the pipeline.

In addition to its reliance on the 1953 Commission Order, Enbridge Limited Partnership cites *Dehn* in support of its argument that it “already has the requisite authority needed from the Commission for the Project based on the Commission’s grant of authority for Line 5 in its 1953 Order.” (Application at 15). But *Dehn* is not on point here. In *Dehn*, the Commission found only



that Act 16 governs both pipelines within Michigan and pipelines that extend to other states, and that Enbridge Limited Partnership was entitled to condemn private land because the proposed Line 5 was for public use. *Lakehead Pipe Line Co. v. Dehn*, 64 N.W.2d 903, 905 (1954). *Dehn* did not undertake an analysis of the pipeline's impact on the public interest, deferring instead to the process undertaken by the MPSC to determine public need. *Id.* at 910-12.

Enbridge Limited Partnership's suggestion that applying Rule 447 to this application would "create a cumbersome process - - not only for Enbridge - - but for other utilities" is totally without merit. (Application at 16). A review of Commission orders demonstrates that parties commonly submit applications when replacing or relocating a pipeline. Following the rupture of Enbridge Limited Partnership's 2010 Line 6B oil pipeline along the Kalamazoo River in Marshall, Michigan – one of the largest inland oil spills in U.S. history – Enbridge Limited Partnership itself filed an application requesting authority to construct, own and operate approximately 15 miles of new 30- or 36-inch diameter pipeline, to be installed to replace certain pipeline segments of its already existing crude oil pipeline known as Line 6B. *See In the Matter of the Application of Enbridge Energy, Ltd. P'ship to Replace, Construct, & Operate Certain Pipeline Segments for the Transportation of Crude Oil & Petroleum in Cass, St. Joseph, & Calhoun Cts., Michigan.*, No. U-16856, 2011 WL 6278338, at 1 (Dec. 6, 2011). The application sought replacement of three separate, noncontiguous, pipeline segments, each approximately 5 miles long, and located immediately downstream of Enbridge Limited Partnership's Niles Pump Station in Cass County. *Id.* Enbridge Limited Partnership made no attempt to argue that these 5-mile replacement segments were already authorized under previous siting authority.

In *Wolverine*, the pipeline company filed an application pursuant to Act 16 seeking authority to construct, operate, and maintain a 12- and 16-inch diameter liquid petroleum products

pipeline system in Jackson, Ingham, and Clinton Counties. *See In Re Wolverine Pipe Line Co.*, No. U-12334, 2001 WL 306697 (Mar. 7, 2001). The proposal involved replacing an 8-inch pipeline with a line having twice the capacity, and Wolverine filed an application pursuant to Act 16. *Id.* *See also In Re Marathon Pipe Line LLC*, No. U-15251, 2007 WL 2042575, at \*1 (June 26, 2007) (approving settlement agreement on Act 16 application for replacement of 29 miles of pipeline).

The Commission should deny the declaratory request because the project that Enbridge Limited Partnership now proposes is a new construction, and differs substantially – and in a legally significant manner – from the project approved under the 1953 Order, and because the Commission routinely requires Act 16 applications for much smaller projects. Enbridge Limited Partnership cannot site its proposed tunnel and pipeline underneath the Straits without an approved Act 16 application to do so.

**B. The Commission Should Deny Declaratory Judgment in Order To Determine, Among Other Things, Whether There Is a Public Need for the Tunnel and Pipeline**

Enbridge Limited Partnership cannot rely on its 1953 approval to ensure that there is a public need for the proposed tunnel and pipeline. The context of a public need determination in 2020 has changed and is significantly different from the context of a public need determination in 1953. Enbridge Limited Partnership claims that the Commission, in 1953, found that the construction, operation and maintenance of Line 5 was in the public interest, and that the segment under the Straits would serve the public interest, including in times of national emergency. (Application at 15). Enbridge seeks to freeze that determination and transport it forward in time forever. That 1953 determination of the public interest did not have the benefit of 67 years of accumulated knowledge regarding the Great Lakes. The Great Lakes are home to 20 percent of the fresh surface water on the planet, provide drinking water to hundreds of thousands of people, and

anchor a thriving tourism industry.<sup>4</sup> We know and recognize that the Straits of Mackinac is one of the most ecologically sensitive areas in the world. And we now realize that emissions of greenhouse gases are causing global climate change, which impacts the Great Lakes in manifold ways.<sup>5</sup> The Great Lakes support one of the world's largest regional economies, similar to those of whole developed nations. Agriculture, industrial manufacturing, fishing, and recreation together form an economic engine. Regional fisheries alone represent a \$7 billion per year industry, and tourism generates \$16 billion more.<sup>6</sup> Energy markets are shifting, and as more renewable energy comes online in Michigan and across the country, the public need for oil is shifting as well. The Commission also must determine whether there are environmental impacts under current environmental laws – nearly all of which did not exist in 1953. Furthermore, important environmental laws at both a state and federal level have shifted the Commission's rubric for evaluating the environmental impact of pipeline projects.

This Commission cannot rely on the conclusions of a 67-year-old Order to ensure Enbridge Limited Partnership's new pipeline is in the public interest, and must instead consider Enbridge Limited Partnership's Act 16 application to determine whether there is, among other factors, a public need for the proposed new construction.

## **V. CONCLUSION**

Enbridge Limited Partnership is attempting to push through without review a significant change in size, in location, and in the nature of the project approved by a Commission Order issued

<sup>4</sup> See State of the Great Lakes 2017 Highlights Report, *Why are the Great Lakes Important?* [https://binational.net/wp-content/uploads/2017/06/SOGL\\_17-EN.pdf](https://binational.net/wp-content/uploads/2017/06/SOGL_17-EN.pdf) (last accessed 5/12/20).

<sup>5</sup> See Environmental Law and Policy Center, *An Assessment of the Impacts of Climate Change on the Great Lakes*, 5-6, 8 available at <http://elpc.org/wp-content/uploads/2019/03/Great-Lakes-Climate-Change-Report.pdf>. (2019) (last accessed 5/12/20).

<sup>6</sup> *Id.* at 1.

67 years ago. Enbridge Limited Partnership's proposed tunnel and pipeline are new constructions and the Commission must require an Act 16 application. Furthermore, the Commission should exercise its discretion to reject the request for declaratory judgment because the 67-year-old determination of public need must now be reviewed and revised.

Respectfully Submitted,



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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

I hereby certify that a true copy of the foregoing *Comments and Objections to the Request for Declaratory Ruling by the Environmental Law & Policy Center and Michigan Climate Action Network* was served by electronic mail upon the following Parties of Record, this 13<sup>th</sup> day of May, 2020.

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