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May 13, 2020

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

RE: MPSC Docket No. U-20763

Dear Ms. Felice:

Attached for filing in the above-referenced matter, please find the *Comments of Applicant Enbridge Energy, Limited Partnership in Support of its Request for Declaratory Relief* and Certificate of Service of same.

Very truly yours,

Fraser Trebilcock Davis & Dunlap, P.C.



Michael S. Ashton

MSA/ab
Attachment
cc: All counsel of record

STATE OF MICHIGAN
BEFORE
THE MICHIGAN PUBLIC SERVICE COMMISSION

**IN RE ENBRIDGE ENERGY, LIMITED
PARTNERSHIP**

Case No. U-20763

**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**

**COMMENTS OF APPLICANT ENBRIDGE ENERGY,
LIMITED PARTNERSHIP IN SUPPORT OF ITS REQUEST
FOR DECLARATORY RELIEF**

I. INTRODUCTION

On April 17, 2020, Enbridge Energy, Limited Partnership (“Enbridge”) filed an Application requesting, to the extent required by law, that the Commission grant Enbridge the authority for its project known as the Straits Line 5 Replacement Segment (the “Project”). In the alternative, Enbridge requested a declaratory ruling to confirm that it already has the requisite authority from the Commission for the Project. On April 22, 2020, this Commission issued an Order seeking comments on Enbridge’s request for declaratory relief by May 13, 2020 and reply comments by May 27, 2020. Enbridge files these comments in support of its request for declaratory relief.

The State of Michigan has made the public policy determination that in order to mitigate a perceived environmental risk to the Great Lakes that the portions of Enbridge’s petroleum pipeline, Line 5, that currently crosses the Straits of Mackinac (“Straits”) should be relocated, operated and maintained within a tunnel beneath the lakebed of the Straits. This public policy, in part, is established through a series of agreements entered between the State of Michigan and Enbridge (the “Agreements”) which will require the permanent deactivation of Line 5’s current crossing of the Straits — consisting of two, 20-inch diameter pipelines referred to as the “Dual Pipelines” — after placing in service the replacement pipe segment to be located within the completed tunnel. This public policy is also established by the enactment of 2018 PA 359 (“Act 359”) which created the Mackinac Straits Corridor Authority (“MSCA”). Act 359 vested the MSCA with the authority to oversee the construction, operation, and maintenance of the tunnel to house the replacement pipe segment, and to own the tunnel upon its completion. In its March 31, 1953 Opinion and Order, this Commission granted approval “to construct, operate and maintain [Line 5] as a common carrier” within Michigan. (Case D-3903-53.1, at page 9.) All Enbridge seeks to do now is replace an approximately four (4)-mile segment of this 645-mile long pipeline (0.6% of the pipeline) within a tunnel to be built under the Straits parallel to, and adjacent to, the Dual Pipelines. Line 5 will not change in any material respect – the pipeline will continue to be used in common carriage service serving the same origins and destinations transporting the same petroleum products it transports today for shippers of such products. The replacement pipe segment will simply be safer, consistent with the public policy goals sought by the State in enacting Act 359 and entering the Agreements. The 1953 Opinion and Order allowing the construction and operation of Line 5 remains in full force and effect and should dictate the outcome to the requested declaratory relief; no further approval is required.

Nothing in 1929 PA 16 (“Act 16”), which governs the Commission’s regulation of petroleum pipelines, requires additional approval from the Commission to replace an approximately four (4)-mile portion of the 645-mile Line 5 pipeline in a setting in which the pipeline’s operation and function will remain unchanged. This is particularly so given that the replacement is occurring solely for the purpose of fulfilling the most recently stated goals of the State of Michigan to address perceived safety concerns by relocating the 4-mile segment into a tunnel. Further, nothing in Rule 447, which governs the applications for the construction of new pipelines and other utility facilities or extension of those facilities, requires the filing of an application to merely relocate a pipe segment within a tunnel. The proposed construction here does not change the transportation status quo other than to address a perceived safety concern. The same petroleum products that would be transported on Line 5 if the replacement pipe segment were not built will otherwise continue to be transported between the same loading and delivery points, serving the same public needs. In short, the purposes served by Line 5 as envisioned and approved by the Commission in 1953 will remain unchanged and thus no further order is needed.

As a result, the Commission should declare that Enbridge already holds all the requisite Commission authority to relocate, operate, and maintain the portion of Line 5 that crosses the Straits within a tunnel beneath the lakebed of the Straits. In the alternative and to the extent the Commission deems that its approval is required, the Commission need not conduct a contested case hearing and should, instead, grant *ex parte* approval of Enbridge’s application in order to advance the established policy of the State of Michigan and promptly obtain the benefits sought

by Michigan in permanently deactivating the Dual Pipelines in order to achieve the State's goal of mitigating a perceived environmental risk to the Great Lakes.¹

II. FACTUAL OVERVIEW

A. Line 5 has Been Found to Serve the Public Interest and Continues to Serve the Public Interest to this Day

On March 31, 1953, this Commission granted approval “to construct, operate and maintain [Line 5] as a common carrier” within Michigan. (March 31, 1953, Opinion and Order, D-3903-53.1, at page 9.) Based on this approval, Line 5 was built and became operational the same year. Line 5 is a 645-mile interstate pipeline that originates in Superior, Wisconsin, and terminates near Sarnia, Ontario, Canada. Line 5 traverses Michigan's Upper and Lower Peninsulas. It is a 30-inch diameter pipeline, except for the Dual Pipelines crossing the Straits.

At the time of its approval, Line 5 was purely an interstate pipeline and did not yet have any receiving or delivery points in Michigan. Opponents of Line 5 objected to the original application on this basis and asserted that Line 5 failed to serve the public interest in Michigan. The Commission specifically rejected as being “without merit” a motion to dismiss that asserted that Line 5 was “not in the public interest.” (*Id.*, at page 8.) Similarly, in *Lakehead Pipe Line Co v Dehn*, 340 Mich. 25, 37-42; 64 N.W. 2d 903 (1954), the Michigan Supreme Court rejected this argument and held that the construction and operation of Line 5 was “for a public use benefiting the people of the State of Michigan,” because of the pledge “to transport in intrastate commerce if given an opportunity to do so.”

¹ See, *In re Wilderness-Chester LP*, Case U-13874, February 12, 2004 Order Denying Rehearing, where the Commission stated it has a “longstanding practice” of not requiring contested case proceedings in Act 9 applications filed under Rule 447. See also, *In re Enbridge Energy*, Case U-17478, September 24, 2013 Order granting relief without a contested case proceeding to permit a re-routing of a segment of a previously approved petroleum pipeline pursuant to Act 16.

Time has affirmed the wisdom of the Commission's and the Supreme Court's earlier determinations that Line 5 is in the public interest and serves a public use benefiting the State of Michigan. Line 5 now provides vital energy transportation to meet the needs of Michigan residents. Line 5 delivers natural gas liquids ("NGLs") to a facility at Rapid River in Michigan, which are converted to propane and then distributed to heat homes and power industry in the Upper Peninsula.² In the Lower Peninsula, Line 5 receives Michigan light crude oil production at Lewiston, where Line 5 interconnects with another pipeline system. Line 5 also delivers crude to the Marysville Crude Terminal that connects with a third-party pipeline, that then transports crude from the Marysville Crude Terminal to refineries in Detroit and Toledo. These refineries produce petroleum products, including gasoline and aviation fuels used by consumers in Michigan. Line 5 also delivers NGLs to a facility in Sarnia, where it is converted to propane for both local consumption and to be imported back to Michigan to meet Michigan's needs. As originally determined, Line 5 is and remains in the public interest and it provides a public use benefiting the people of the State of Michigan.

B. The State's Established Public Policy is to Relocate Line 5 within a Tunnel and Deactivate the Dual Pipelines

The State of Michigan established its public policy to relocate Line 5's crossing of the Straits within a tunnel to be constructed, with the State's oversight, beneath the lakebed of the Straits and then to permanently deactivate the Dual Pipelines. This public policy was informed, in part, through information gathered by a task force and later an advisory board to examine issues relating to pipelines located in Michigan. The public policy is effectuated through a series of

² "The Upper Peninsula consumes approximately 34 million gallons of propane per year, about 78 percent of that for residential purposes. Of the amount used by residents, between 60-70 percent represents home heating and is, therefore, affected by seasonal weather variations. In an extremely cold winter, residential use can increase by about 20 percent." (*Upper Peninsula Energy Task Force Committee Recommendations*, at page 5.)

contractual agreements entered into by the State of Michigan and Enbridge, which among other things, will require the permanent deactivation of the Dual Pipelines after placing in service the replacement pipe segment located within a tunnel. This public policy is also established by the enactment of Act 359 creating the MSCA and vesting it with the authority to “acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel” to house the replacement pipe segment. MCL 254.324a(1) and 254.324d(1).

1. The First and Second Agreements with State of Michigan

In November 2017, the State of Michigan and Enbridge entered into a contractual agreement, commonly referred to as the First Agreement (Exhibit A-8), to improve the stewardship of Line 5, evaluate potential replacement of the Dual Pipelines, and improve operations and safety criteria for other parts of Line 5 throughout the state. The First Agreement recognized that “the continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of propane to meet the needs of Michigan citizens, supporting businesses in Michigan, and transporting essential products, including Michigan-produced oil to refineries and manufacturers.” (*Id.* at page 1.) The First Agreement was entered into with the understanding that “the State and Enbridge desire[d] to establish additional measures and undertake further studies with respect to certain matters related to Enbridge’s stewardship of Line 5 within Michigan.” (*Id.* at page 2.) As one measure to “further protect ecological and natural resources held in public trust by the State of Michigan,” Enbridge agreed to conduct an evaluation of alternatives to replace the Dual Pipelines. (*Id.* at pages 2 and 5.) Enbridge and the State of Michigan also agreed (at Stipulation I.H) to initiate discussions following the completion of Enbridge’s alternatives evaluation to enter into a further agreement concerning the operation of the Dual Pipelines. (*Id.*)

As required by the First Agreement, Enbridge submitted the completed alternatives analysis to the State of Michigan on June 15, 2018. (Exhibit A-9.) Enbridge’s alternatives analysis concluded that construction of a tunnel beneath the lakebed of the Straits connecting the Upper and Lower Peninsulas of Michigan, and the installation of a replacement pipe segment within the tunnel, was a feasible alternative to the Dual Pipelines. As a result of this analysis, Enbridge entered into what is commonly referred to as the “Second Agreement” dated October 4, 2018, with the State of Michigan, Michigan Department of Natural Resources (“MDNR”), and the Michigan Department of Environmental Quality, now known as the Department of Environment, Great Lakes, and Energy (“EGLE”). (Exhibit A-10.) The Second Agreement recognizes that “the evaluations carried out pursuant to the First Agreement have identified near-term measures to enhance the safety of Line 5, and a longer-term measure – the replacement of the Dual Pipelines – that can essentially eliminate the risk of adverse impacts that may result from a potential release from Line 5 at the Straits.” (*Id.* at page 3.) Under Stipulation I.F of the Second Agreement, Enbridge and the State of Michigan agreed to “promptly pursue further agreements” concerning the construction and operation of a tunnel to replace the Dual Pipelines. (*Id.* at pages 5 – 6.) The Second Agreement recognized that the tunnel “is a feasible alternative for replacing the Dual Pipelines, and that alternative would essentially eliminate the risk of adverse impacts that may result from a potential oil spill in the Straits.” (*Id.*)

2. Enactment of Act 359

On December 12, 2018, the Michigan Legislature enacted Act 359 to further the public policy of deactivating the Dual Pipelines and relocating Line 5’s crossing of the Straits within a tunnel. Specifically, Act 359 states: “[t]he creation of the Mackinac Straits corridor authority [MSCA] and the carrying out of the **Mackinac Straits corridor authority’s authorized purposes**

are public and essential governmental purposes for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state, and these purposes are public purposes.” (MCL 254.324b(1); emphasis added.) The purpose of Act 359 is to vest the MSCA with the authority to “acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel” to house the replacement pipe segment. MCL 254.324a(1) and 254.324d(1). In particular, Act 359 authorized the MSCA to enter an agreement for the construction, maintenance, and operation of a tunnel “with a mechanism to ensure that a utility tunnel is built to sufficient technical specifications and maintained properly to ensure a long asset life and secondary containment for any leak or pollution from utilities using the tunnel.” MCL 254.324d(4)(d).

3. The Third Agreement and Tunnel Agreement

Upon passage of Act 359, Enbridge entered into the Third Agreement (Exhibit A-1) with the State of Michigan, MDNR, and EGLE. In the Third Agreement, “Enbridge agrees as soon as practical following the completion of the Tunnel and after the Straits Line 5 Replacement Segment is constructed and placed in service by Enbridge, Enbridge will cease operations of the Dual Pipelines and permanently deactivate the Dual Pipelines.” (*Id.* at Paragraph 7.1) The Third Agreement recognizes that this “replacement of the Dual Pipelines with the Straits Line 5 Replacement Segment in the Tunnel is expected to eliminate the risk of a potential release from Line 5 at the Straits.” (*Id.* at Paragraph 4.2(c).)

In accordance with Act 359, Enbridge and the MSCA entered into the Tunnel Agreement (Exhibit A-5) for the construction of the tunnel and replacement of the Dual Pipelines with a replacement pipe segment to be located within that tunnel. In the Tunnel Agreement, MSCA agreed to acquire from the MDNR an easement to be used for the tunnel. (*Id.* at Paragraph 3.1(a).)

The MSCA subsequently assigned certain rights under that MDNR easement to Enbridge allowing Enbridge to use the tunnel easement to construct, operate and maintain the tunnel for the Line 5 replacement pipe segment. (*Id.* at Paragraph 3.1(b).) The Tunnel Agreement describes the tunnel as being “approximately four (4) miles in length, extending from an opening point as near as practical to Enbridge’s existing station located on the north shoreline of the Straits to an opening point as near as practical to Enbridge’s existing Mackinaw station located on the south shoreline of the Straits.” (*Id.*, at Paragraph 6.1.) The diameter of the tunnel will be sized to “efficiently construct the Tunnel and to construct, operate and maintain a 30-inch Line 5 Replacement Segment.” (*Id.*) The Tunnel Agreement also requires the tunnel to “be constructed of a suitable structural lining, providing secondary containment to prevent any leakage of liquids from the Line 5 Replacement Segment into the lakebed or Straits.” (*Id.*)

C. The Project Will Fulfill The State’s Established Public Policy

1. The Sole Purpose of the Project is to Mitigate a Perceived Environmental Risk

With this Application, Enbridge is not seeking approval to construct a new pipeline or an extension of an existing pipeline. Line 5 is already a fully operational 645-mile interstate pipeline that has been previously determined by this Commission and the Supreme Court to be in the public interest and a public benefit to the people of Michigan. Since its initial approval, the benefits of Line 5 to the people of Michigan have only increased by supplying needed feedstock to produce propane that is consumed in Michigan, receiving crude oil that is produced in Michigan, and interconnecting with other pipelines that serve refineries that produce fuels consumed by Michigan residents.

The sole purpose or “public need” for the Project is to fulfill the established public policy of the State of Michigan, which is to mitigate the perceived environmental risk to the Great Lakes

caused by the approximately four (4)-mile portion of Line 5 that currently crosses the Straits, so that this portion of Line 5 can be relocated, operated and maintained within a tunnel beneath the lakebed of the Straits. In enacting Act 359, the Michigan Legislature has determined that the tunnel to house the replacement pipe segment serves a “public and essential governmental purpose[]” which is “for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state.” MCL 254.324b(1). As set forth in the Third Agreement, Enbridge agrees that as soon as practical following the completion of the tunnel and after the replacement pipe segment is constructed and placed in service, “Enbridge will cease operations of the Dual Pipelines and permanently deactivate the Dual Pipelines.” (*Id.*, at Paragraph 7.1.)

In March 2020, the MSCA confirmed Enbridge’s choice of contractors that will design and build the tunnel. Further, in April 2020 Enbridge submitted applications to EGLE and the US Army Corps of Engineers for permits as needed to construct the tunnel.

2. The Relocation Project Does Not Alter the Nature or Objective of Line 5

As set forth above, this Project involves replacing and relocating approximately four (4) miles of an already operational 645-mile interstate pipeline in order to fulfill the established public policy objective of the State of Michigan. The Project does not alter the nature of the service provided by Line 5. The Project does not alter the annual average capacity of Line 5. The Project does not change or create any new receiving or delivery points along Line 5.

As initially approved, Line 5 is a 30-inch pipeline, except for the Dual Pipelines which cross the Straits. In order to meet the State of Michigan’s objective, Enbridge will cease operations of and permanently deactivate the Dual Pipelines after the 30-inch replacement pipe segment located within the tunnel is placed in service. The change to a single 30-inch pipe is to allow for

relocation within the tunnel. It does not to alter the nature or objective of the pipeline service or the capacity of Line 5.

3. The Tunnel is Located along the Existing Route of Line 5

This approximately four (4)-mile Project also does not alter the route taken by Line 5. The pipeline will continue to traverse the Straits from the northside from Moran Township in Mackinac County, to the southside of the Straits in Wawatam Township in Emmet County. In fact, the tunnel easement is located beneath the existing westerly Dual Pipeline. (See Figure No. 1 in Application page 7.) Thus, the path of the replacement pipe segment follows the existing route of Line 5, albeit it will be located in a tunnel beneath the lakebed of the Straits. Again, the different location for the replacement pipe segment within the tunnel is solely to effectuate the stated public policy objective of the State of Michigan, which is to relocate Line 5's crossing of the Straits to a tunnel so that the Dual Pipelines may be permanently deactivated to mitigate a perceived environmental risk to the Great Lakes.

III. LEGAL ANALYSIS

A. 1953 Order Provides Enbridge the Right to Construct, Operate and Maintain Line 5

In the 1953 Opinion and Order, the Commission granted approval “to construct, operate and maintain [Line 5] as a common carrier” within Michigan. (Case D-3903-53.1, at page 9.) The Project falls squarely within the scope of this previously granted authority. Here, Enbridge is not seeking to construct, operate, or maintain any pipeline other than Line 5. Enbridge is merely relocating approximately four (4) miles of the 645-mile pipeline within a tunnel which is located along the pipeline's existing route and beneath the lakebed of the Straits so that it may permanently deactivate the Dual Pipelines. The completion of the Project allows Line 5 to be operated and

maintained in a manner that mitigates a perceived environmental risk to the Great Lakes – and is in furtherance of the established policy of the State of Michigan.

The Project does not alter the nature or the services provided by Line 5. The Project does not change the annual average capacity of Line 5. The Project does not extend Line 5 to serve additional markets or alter its route. The Project will allow for the deactivation of the Dual Pipelines and the putting in service a 30-inch replacement pipe segment within the tunnel to fulfill an important state policy, which is entirely within the existing authority granted by the Commission to construct, operate, and maintain Line 5.

B. Act 16 Does Not Require Application or Approval for the Project

Act 16 establishes the Commission authority over petroleum pipelines. MCL 483.1, *et al.* No provision in Act 16 requires additional authority to be obtained from the Commission to relocate at the behest of the State a small portion of the previously approved pipeline. Here, the Project will relocate - within a tunnel that is located along the pipeline's existing route - approximately four (4) miles of 645-mile pipeline (or 0.6%) of the Commission-approved pipeline. While Section 6 of Act 16 requires a filing a "plat" showing the location of the pipeline, Section 6 does not require pre-approval of the plat by the Commission and Enbridge will comply with this filing requirement upon completion of the Project. MCL 483.6.

C. Rule 447 Does not Require an Application for the Project

The Commission has adopted Rule 447, being R 792.10447, to require an application for the construction of certain pipeline and electric facilities. When read as whole, Rule 447 applies only to construction of a new pipeline or electric facilities or the extension of an existing pipeline or electric facilities. Rule 447, on its face, does not require an application to be filed where a portion of an existing pipeline or electric facility is being relocated at the behest of the government.

It is clear from its text that Rule 447 is designed to require an application only when a utility seeks to construct new pipelines or electric facilities so that capital is not expended unnecessarily to compete with another utility or, where applicable, needlessly increase rates regulated by the Commission.

1. Rule 447 Must be Read as a Whole

“Principles of statutory interpretation apply to the construction of administrative rules.” *City of Romulus v. Michigan Dept. of Environmental Quality*, 254 Mich. 54, 64; 678 N.W. 2d 444 (2003), citing *Detroit Base Coalition for Human Rights of Handicapped v. Dept. of Social Services*, 435 Mich. 172, 185; 428 N.W. 2d 335 (1988). In interpreting a statute, the Supreme Court in *Ally Financial Inc. v. State Treasurer*, 502 Mich. 484, 493; 918 N.W. 2d 662 (2018) stated:

When interpreting unambiguous statutory language, the statute must be enforced as written. No further judicial construction is required or permitted. [O]ur goal is to give effect to the Legislature’s intent, focusing first on the statute’s plain language. We must examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. In doing so, we consider the entire text, in view of its structure and of the physical and logical relation of its many parts. (Footnotes and quotation marks omitted.)

In interpreting Rule 447 as one would a statute, one must consider the entire rule as a whole and the entire text and the many parts of the rule.

Rule 447, in its entirety, provides:

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

(a) A gas or electric utility within the meaning of the provisions of 1929 PA 69, MCL 460.501 to 460.506, that wants **to construct** a plant, equipment, property, or facility for furnishing public utility service for which a certificate of public convenience and necessity is required by statute.

(b) A natural gas pipeline company within the meaning of the provisions of 1929 PA 9, MCL 483.101 to 483.120, that wants **to construct** a plant, equipment, property, or facility for furnishing public utility service for which a certificate of public convenience and necessity is required by statute.

(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.

(2) The application required in subrule (1) of this rule shall set forth, or by attached exhibits show, all of the following information:

(a) The name and address of the applicant.

(b) The city, village, or township affected.

(c) The nature of **the utility service to be furnished**.

(d) The municipality from which the appropriate franchise or consent has been obtained, if required, together with a true copy of the franchise or consent.

(e) A full description of the **proposed new construction or extension**, including the manner in which it will be constructed.

(f) The names of all utilities rendering the same type of service with which the proposed new construction or extension is likely to compete.

(3) A utility that is classified as a respondent pursuant to R 792.10402 may participate as a party to the application proceeding without filing a petition to intervene. It may file an answer or other response to the application. (Emphasis added.)

Section (1) of the rule identifies when utilities listed in subsection (1)(a), (b), and (c) must file an application with the Commission. The triggering event in all three subsections is when the utilities seek “to construct” facilities to provide future service. Here, Enbridge already has the required approval; more is not needed. When Rule 447 is read as a whole, it is unambiguous that the type

of construction requiring an application pursuant to Section (1) is the type of construction that relates to “service to be furnished” in the future but not yet in service as set forth in Subsection (2)(c) and service that falls within the meaning of “new construction or extension” as set forth in Subsection (2)(d) and at least has the potential to cause competition with other utilities identified in Section (3).

Section (2) of Rule 447 specifically identifies the information required to be filed in the application. Subsection (2)(c) requires an application relating to services “to be furnished.” In other words, an application is required for future services and not for services already being provided. Subsection (2)(d) requires a full description of the “new construction or extension.” Section (2) does not require a description of any other type of construction - other than “new construction or extension.” Thus, when Sections (1) and (2) are read together, the type of construction requiring an application is the type of construction that will furnish new service and falls within the meaning of the phrase “new construction or extension” set forth in Subsection 2(d). That is not the case here.

2. The Project is Not “New Construction” or an “Extension”

In *People v. McGraw*, 484 Mich. 120, 126, 771 N.W. 2d 655 (2009), the Court stated that “in interpreting a statute, we avoid a construction that would render part of the statute surplusage or nugatory.” As set forth in Subsections (2)(c) and (d), Rule 447 unambiguously services “to be furnished” in the future and applies to “proposed new construction or extension” of a pipeline and electric facility. In interpreting the type of construction that subject to Rule 447, meaning must be provided to the phrase “to be furnished” and the term “new” which modifies the type of “construction” or “extension” in Rule 447.

If Rule 447 was to be interpreted broadly to include any and all construction activity including construction relating to modifying, maintaining, replacing or relocating an existing pipeline or electric facility, this interpretation would conflict with Subsection (2)(c) which limits applications to services “to be furnished” in the future with services already being provided. In addition, there would be no need to include the phrase “new” to modify the term “construction” in Subsection (2)(b) if it applied to construction relating modifying, maintaining, replacing or relocating an existing facility. To give meaning to all the words in Subsection (2)(d) the term “new” must limit or describe a particular type of “construction,” i.e., the construction of a proposed new pipeline. This is particularly true, given the juxtaposition of the phrase “new construction” with the term “extension” which clearly means the act of extending an existing pipeline or electric facility to a new service area. In this context, the plain meaning of the phrase “new construction or extension” does not include replacing or relocating a portion of an existing pipeline along its existing route at the behest of a governmental entity.

The interpretation of “new construction or extension” as limited to a new pipeline or extension of an existing pipeline to provide service for the first time in an area is also supported by the unambiguous language of Subsection (2)(b), which requires that the application include a description of “the nature of the utility **service to be furnished.**” (emphasis supplied). The use of the verb “to be” references service not yet provided, but to be provided in the future. The use of the verb “to be” is consistent with the conclusion that Rule 447 addresses the construction of a new pipeline or electric facility, but is plainly inconsistent with an interpretation that would apply Rule 447 to construction that merely maintains, replaces or relocates a portion of an existing pipeline or electric facility that is already providing service.

3. Rule 447 Governs New Construction or Extension that has the Potential to Compete with other Utilities

When Section (3) of Rule 447 is read in conjunction Sections (1) and (2) any doubt is removed that Rule 447 governs construction of new pipelines and extensions of those pipelines that are providing new service as opposed to any and all construction relating to modifying, maintaining, replacing or relocating an existing facility. Section (3) provides the automatic right to participate in the application proceeding to a utility “classified as a respondent pursuant to R 792.10402.” Rule 402 defines a respondent to be a “utility rendering the same kind of service within a municipality or part of a municipality proposed to be served by another utility in a proceeding under the provisions of R 792.10447.” When another utility intends to extend a pipeline or electric facility into an area to compete with an existing utility, Rule 447 for good reason automatically allows participation of that utility to ensure that the proposed new service does not unfairly or injuriously compete with the existing utility’s service to its detriment or its ratepayers’ detriment. Yet, there is no reason to allow for automatic participation if Rule 447 also includes construction relating to modifying, maintaining, replacing or relocating an existing pipeline or electric facility within an existing service area. Such an interpretation of Rule 447 would be nonsensical: there is no reason why a competing utility should have the ability to intervene as a matter of right in an application relating to another utility’s replacement of existing facilities already in service. In short, applying Rule 447 here would lead to a result that has no basis in logic. *Luttrell v. Dept. of Corrections*, 421 Mich. 93, 106; 365 N.W. 2d 74 (2004), where the Court stated that it “is a recognized rule of statutory interpretation that the courts will not construe a statute so as to achieve an absurd or unreasonable result.”

4. Adverse Policy Impacts Will Occur if Rule 447 is Extended to the Project

An interpretation of Rule 447 to apply to circumstances other than placing new pipelines and electric facilities in service or extending those facilities to new service areas ignores the plain language of Rule 447 when read as a whole, and such an interpretation may create unintended consequences and undue delays to necessary future projects. The interpretation of Rule 447 adopted in this proceeding involving a petroleum pipeline will also apply equally to electric and gas distribution utilities. To require Enbridge to file an application in order to replace and relocate a small portion of Line 5 in a tunnel which is located along the existing route of Line 5 at the behest of the State of Michigan therefore will have similar impacts on electric and gas utilities. For example, if the Michigan Department of Transportation or a county road commission were to request or require the relocation of existing utility facilities, then those utilities would then be required to file an application seeking to replace and relocates their facilities pursuant to Rule 447. Likewise, if these utilities decided to construct replacement facilities to enhance their existing facilities either in their existing or nearby location, then they would again have to file an application pursuant to Rule 447.

A review of the Commission's decisions in Rule 447 cases show that applications are not filed in these circumstances and no cases have been identified wherein the Commission has taken enforcement action against a utility for failing to file such an application.³ The foregoing supports Enbridge's interpretation of Rule 447 as applying to new pipelines or extension of pipelines to

³ Applications are filed pursuant to Rule 447 for new facilities to be constructed to serve new areas. *See for example, In re Michigan Consolidated Gas Company*, Case U-11231, September 12, 1997 Opinion and Order at page 7; *compare In re Wolverine Pipeline*, Case U-16450, January 20, 2011 Order Dismissing Application, concluding an application was not required where an approved pipeline merely changed the type of petroleum product being transported.

furnish new service, but not construction that relates to replacing small sections of previously approved facilities that already operate in that same area.

D. If Declaratory Relief is not Granted, *Ex Parte* Relief Should Be Granted

Even if the Commission were to decide that declaratory relief should not be granted, there is no requirement in Act 16 or Rule 447 for the Commission to conduct a contested case. Instead, the Commission should grant *ex parte* approval of the Project. The grant of *ex parte* approval is entirely consistent with the Commission's efforts to be transparent because the issue presented in this Application is both narrow and exceedingly straightforward. While the construction of the tunnel and continued operation of Line 5 may be opposed by some, those issues are separate from this Application. The only issue presented by Enbridge's Application should not be controversial: if the Application is granted, Enbridge will (1) relocate Line 5 in a tunnel for which permits are being sought in separate proceedings at other agencies and (2) deactivate the Dual Pipelines. Assuming that the tunnel is permitted and constructed, the relocation of the pipeline under the Straits into the tunnel will result in mitigation of a perceived environmental risk to the Great Lakes. Of course, if the permission needed to either build the tunnel or relocate the pipeline within the tunnel is not forthcoming, Enbridge will continue to operate the Dual Pipelines.

Some members of the public attempt to inject controversy into this proceeding by continuing their advocacy against the construction of the tunnel.⁴ Yet, Act 359 has already vested the MSCA with the authority to "acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel." MCL 254.324a(1) and 254.324d(1). The Michigan Legislature has

⁴ The Michigan Court of Claims held on October 31, 2019 that Act 359 is constitutional, confirming the validity and enforceability of various agreements relating to the tunnel. *Enbridge Energy, Limited Partnership, et al. v. State of Michigan, et al.*, Case No. 19-000090-MZ (Oct. 31, 2019). The Attorney General appealed that decision, and that appeal remains pending before the Michigan Court of Appeals. *Enbridge Energy, Limited Partnership, et al. v. State of Michigan, et al.*, Court of Appeals No. 351366.

already determined that creation of the tunnel is a “public and essential governmental purpose[.]” and is “for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state.” MCL 254.324b(1). The MSCA has already received an easement from the MDNR for the tunnel, assigned certain easement rights to Enbridge and entered a Tunnel Agreement addressing the construction of the tunnel, and confirmed the choice of contractors which will build the tunnel, which MSCA will own upon completion.

Moreover, separate proceedings initiated recently by Enbridge at EGLE and at the US Army Corps of Engineers will address permitting of the tunnel. [Enbridge Energy, Limited Partnership Joint Permit Application, Submission No. HNY-NHX4-FSR2Q (April 8, 2020); Enbridge Energy, Limited Partnership National Pollutant Discharge Elimination System Application, Submission No. HNY-TBJC-PNK8V (April 17, 2020).] The public will have opportunity to fully participate in those proceedings. While the tunnel project may engender some degree of public controversy; this Commission proceeding should not. The question here is simply whether a replacement pipe segment may be located within a tunnel that is authorized by other agencies. If not, Enbridge will continue to operate the Dual Pipelines.

In short, the issue posed by Enbridge’s Application in this proceeding is simple and straightforward and not inherently controversial – should Enbridge be allowed to relocate a four (4)-mile segment of a 645-mile, previously authorized and constructed pipeline into a new tunnel. The construction and location of the replacement pipe segment within the tunnel will mitigate a perceived environmental risk to the Great Lakes. Enbridge has already agreed to this relocation. Those opposing Enbridge’s Application are not actually seeking to have the Dual Pipelines continue in operation. Instead, their opposition is an effort to seek leverage with respect to their

opposition to the construction of the tunnel or the continued operation of Line 5, neither of which are legitimate issues in this proceeding.

IV. CONCLUSION

Enbridge stands at the ready to construct the tunnel, place the replacement pipe segment within the tunnel, and permanently deactivate the Dual Pipelines. Upon the grant of its request for declaratory ruling or approval of its Application by this Commission and the issuance of the environmental permits, Enbridge will move forward with the Project, which will fulfill an important public policy objective of the State of Michigan. As a result, Enbridge requests a prompt resolution of its Application.

V. RELIEF REQUESTED

WHEREFORE, Enbridge respectfully requests that this Honorable Commission issue a declaratory ruling pursuant to Section 63 of the Administrative Procedures Act of 1969 (being MCL 24.263), and Rule 448, (being R 792.10448) or other finding, that Enbridge already has obtained the authority it needs from the Commission for the Project or, in the alternative, acting under its authority pursuant to 1929 PA 16, as amended, and Rule 447 grant *ex parte* approval for the Project as requested in the Application.

Respectfully submitted,

Dated: May 13, 2020

A handwritten signature in black ink, appearing to be 'MAS', with a long horizontal stroke extending to the right.

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION


**IN RE ENBRIDGE ENERGY, LIMITED
PARTNERSHIP**

Case No. U-20763

**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**

CERTIFICATE OF SERVICE

Angela R. Babbitt hereby certifies that on the 13th day of May, 2020, she served the *Comments of Applicant Enbridge Energy, Limited Partnership in Support of its Request for Declaratory Relief* and this Certificate of Service in the above docket on the persons identified on the attached service list by electronic mail.



Angela R. Babbitt

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