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August 11, 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 ***Applicant Enbridge Energy, Limited Partnership's Objections to the Petitions to Intervene Filed by The Michigan Environmental Council, Tip Of The Mitt Watershed Council, The National Wildlife Federation, For Love Of Water, The Environmental Law & Policy Center, And Michigan Climate Action Network***.

Thank you.

Very truly yours,

Fraser Trebilcock Davis & Dunlap, P.C.

Michael S. Ashton

Michael S. Ashton
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Date: 2020.08.11 13:23:03 -04'00'

MSA/ab
Attachments
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	)	

APPLICANT ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S OBJECTIONS TO THE PETITIONS TO INTERVENE FILED BY THE MICHIGAN ENVIRONMENTAL COUNCIL, TIP OF THE MITT WATERSHED COUNCIL, THE NATIONAL WILDLIFE FEDERATION, FOR LOVE OF WATER, THE ENVIRONMENTAL LAW & POLICY CENTER, AND MICHIGAN CLIMATE ACTION NETWORK

I. INTRODUCTION

On April 17, 2020, Enbridge Energy, Limited Partnership ("Enbridge") filed its application, supporting testimony, and exhibits seeking to relocate the portion of its Line 5 pipeline from the floor of the Straits of Mackinac ("Straits") to within a tunnel beneath the Straits ("Project"). This application results from the Michigan Legislature's enactment of Public Act 359 of 2018 ("Act 359") which allows the Line 5 Strait's crossing to be relocated within a tunnel to fulfill an important State policy objective: to "essentially eliminate the risk of adverse impacts that may result from a potential release from Line 5 at the Straits." (The Second Agreement, Exhibit

A-10, p.3.)[1] The relocation within a tunnel entirely eliminates the possibility of an anchor strike causing a release from Line 5, and provides multiple layers of protection (the pipeline, the tunnel with its concrete liner, and approximately 60 feet to 250 feet of earth) between the pipeline and the lakebed of the Straits.

Enbridge's application does not seek authority to construct the tunnel – the tunnel permitting agencies are the Department of Environment, Great Lakes and Energy and the US Army Corps of Engineers. Instead, Enbridge seeks approval from this Commission to relocate an approximately 4-mile portion of Line 5 that crosses the Straits (sometimes referred to as the "replacement pipe segment") within the tunnel. The Michigan Legislature overwhelmingly supported relocating Line 5 within a utility tunnel by its passage of Act 359. In doing so, the Michigan Legislature specifically vested the Mackinac Straits Corridor Authority ("MSCA") with the authority "to acquire, construct, operate, maintain, improve, repair, and manage" this multipurpose utility tunnel "joining and connecting the Upper and Lower Peninsulas of this state at the Straits." MCL 254.324a(1), MCL 254.324d(1) and MCL 254.324(e). Thus, the Commission does not have jurisdiction over the tunnel and the approval of its construction is not part of this proceeding.

The Michigan Environmental Council ("MEC"), Tip of the Mitt Watershed Council ("ToMWC"), The National Wildlife Federation ("NWF"), For Love of Water ("FLOW"), the Environmental Law & Policy Center ("EL&PC"), and Michigan Climate Action Network ("MCAN") (collectively the "Organizations") have each filed petitions to intervene. The

[1] Act 359, which creates the multipurpose utility tunnel, was overwhelmingly passed with bipartisan support. The House of Representatives approved by a vote of 74 to 34 (House Journal 78 p. 2536) and the Senate approved by a 25 to 12 vote (Senate Journal 77, p. 2118). The Court of Appeal affirmed the constitutionality of Act 359 in *Enbridge Energy, L.P. v. State of Michigan*, __ Mich. App. ___ [2020 WL 31068411] (June 11, 2020). The State has not sought review in the Michigan Supreme Court and the deadline for seeking review has passed.

Organizations oppose the protection to be provided to the Great Lakes by relocating Line 5 within the tunnel as envisioned by Act 359, because in their view this protective measure may prolong consumers' use of fossil fuels and will delay the transition to other energy sources. Some of the Organizations also oppose relocating Line 5 within a tunnel because they oppose the construction of the utility tunnel itself, or because the relocation of Line 5 within the tunnel does not address their other alleged safety concerns regarding Line 5's existing operations.

The fatal flaw in the Organizations' opposition to the Project is the fact that if Enbridge's application is denied, then Line 5 will continue to operate in its current location and without the beneficial protection to the Great Lakes offered by the Project as envisioned by Act 359. While they seek to turn this proceeding into a litigation over whether Line 5 should continue to operate, that is not what this case is about. The question here is much narrower: should Enbridge be allowed to relocate Line 5 into a protective tunnel and thereby eliminate the risk of anchor strikes? Michigan law supports this goal and puts to rest the issues that the Organizations wish to inject into the proceeding.

The Organizations' petitions to intervene must be denied because they fail to satisfy the Commission's two-prong test for standing adopted by the Commission from *Association of Data Processing Service, Inc. v. Camp*, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970) and applied to utility matters in *Drake v Detroit Edison Company*, 453 F Supp 1123 (W.D. Mich. 1978).[2] The Michigan Environmental Protection Act ("MEPA") also does not provide a right to intervene, particularly when the Attorney General has sought intervention to address MEPA. The Organizations should also be denied permissive intervention because they do not "bring a unique perspective to the issues raised," and instead they intend to raise and litigate issues that are far

[2] *See, In In the matter of the application of ZFS Ithaca, LLC,* November 8, 2018 Order, Case U-20198.

outside the scope of the case and the Commission's jurisdiction. At a bare minimum, pursuant to Rule 412(1) (R 792.10412(1)), the Organizations' intervention should be limited to only the issues this case actually presents.

II. LEGAL ANALYSIS

A. THE ORGANIZATIONS LACK STANDING TO INTERVENE AS A MATTER OF RIGHT

The Commission has established a two-pronged test to determine if a person is entitled as a matter of right to intervene in a Commission proceeding. In *In re Michigan Consolidated Gas Co.*, Case No. U-9138, Opinion and Order, November 10, 1988, p. 5, the Commission stated:

> Before a party can either institute or intervene in a legal proceeding, it must have standing to do so. Mere interest in the outcome of the proceeding is insufficient; the party must satisfy the two-prong test established by the U.S. Supreme Court in *Association of Data Processing Service, Inc v Camp*, 397 US 150; 90 S Ct 827, 25 L Ed 2d 184 (1970) and applied to utility matters in *Drake v Detroit Edison Company*, 453 F Supp 1123 (W.D. Mich. 1978). This test requires the party in question to show: *1) it suffered an "injury in fact;" and 2) that the interests allegedly damaged are within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question. Drake*, supra, p. 1127. [Emphasis added.]

To have a right to intervene, a person must meet both prongs of this test. Here, the Organizations fail to meet either one.

1. THE ORGANIZATIONS HAVE NOT SHOWN AN INJURY IN FACT WHICH WOULD BE CAUSED BY GRANTING THE APPLICATION

An "injury in fact" requires demonstration of an invasion of a legally protected interest which is both (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Alltel Communications, Inc. v. Michigan Bell Tel Co.*, Case No. U-15166, Order, May 22, 2007 at p. 22. Without establishing an actual and concrete injury, the Commission has

held that a person's mere interest alone in a proceeding is not enough to make the person eligible for intervention. *In re Consumers Power Co.*, MPSC Case No. U-9433, Opinion and Order, February 22, 1990 at pp. 4-5. The Organizations' alleged harms fail to meet the injury in fact test to establish standing because their allegations of harm are unrelated to the relief requested in Enbridge's application.

The Organizations assert "concrete and particularized" harms which they claim are "actual or imminent" due to "[h]eavy precipitation and flooding caused by climate change" and the current operation of Line 5 poses a risk to water resources. (EL&PC and MCAN petition at pp. 6 -7, ¶ ¶ 12 and 13.) Similarly, others argue that "if Line 5 continues to operate they "face a daily risk of harm from a release" and they "are harmed by the continued operation of Line 5 because it delays the transition to cleaner and more-cost-effective low-carbon sources of energy and impedes efforts to mitigate the effects of climate change." (NWF pp. 2-3, ¶ 7; see also MEC p. 3 ¶ 9; ToMWC p. 3 ¶ 10; and FLOW petition, p. 3 ¶ 4.) Some Organizations also claim their "interests …are threatened with the development of the proposed tunnel" and that the "inland section of Line 5" is "more susceptible to leaks." (*See e.g.,* ToMWC petition, p. 3 ¶ 10.) These asserted generalized harms do not constitute "concrete and particularized" harms which are "actual or imminent." Nor do these asserted harms arise from Enbridge's application seeking to protect the Great Lakes by locating the replacement pipe segment that crosses the Straits within a tunnel.

Whether the Commission grants or denies the application, Line 5 will continue to operate - - either in a tunnel or on the floor of the Straits. The application involves only a request for authority to relocate the Line 5 Straits crossing into a tunnel to provide greater protection to the Great Lakes, not a request to continue operating Line 5. Any alleged harm relating to the continued

operation of Line 5, an inland release from Line 5, or climate change are unrelated to the application and legally irrelevant.

Further, the alleged harm related to the construction or creation of the tunnel is unrelated to Enbridge's application. Enbridge's application does not seek approval of the tunnel itself, but merely the authority to locate the replacement pipe segment *into* the tunnel. The Michigan Legislature has already established the State's policy objective to create the utility tunnel when it overwhelmingly enacted Act 359. In doing so, the Michigan Legislature specifically vested the MSCA with the authority "to acquire, construct, operate, maintain, improve, repair, and manage" this multipurpose utility tunnel. MCL 254.324a(1) and MCL 254.324d(1). The creation of the tunnel is the result of policy choices made by the Michigan Legislature and the authority and oversight over the tunnel and its construction is assigned to MSCA.[3] This proceeding does not address that subject.

Finally, the unsupported assertion that somehow relocating Line 5 within a tunnel will increase Line 5's longevity and somehow "delay[] the transition to cleaner and more-cost-effective low-carbon sources of energy and impede[] efforts to mitigate the effects of climate change" is complete speculation with zero foundation in fact. To justify intervention, an alleged injury in fact cannot be "conjectural or hypothetical." *Alltel Communications, Inc. v. Michigan Bell Tel Co.*, Case No. U-15166, Order, May 22, 2007 at p. 22. There is no actual evidence that relocating Line 5 within a tunnel to protect the Great Lakes will increase the longevity of its operations. Further, there is no actual evidence that Line 5's operation is somehow preventing the transition "to cleaner

[3]The tunnel will be constructed in accordance with the environmental permits to be obtained from the United States Army Corps of Engineers ("USACE") and the Michigan Department of Environment, Great Lakes and Energy ("EGLE"). The Organizations will have an opportunity to participate in the process before those agencies to address their concerns regarding the potential impact relating to the tunnel construction on the environment.

and more-cost-effective low-carbon sources of energy," if Line 5's operation was even at issue here, which it is not. At best, this alleged harm is based on pure speculation.

2. The Asserted Harms Do Not Fall Within The Zone of Interests to be Protected by Act 16

The Organizations' alleged injury also does not fall within the zone of interests to be protected by Act 16. The Organizations rely on two provisions in Act 16, MCL 483.3 and MCL 483.2b. Neither support intervention because the alleged harm does not fall within the zone of interests to be protected by those statutes.

MCL 483.3 broadly states that "the commission is granted the power to control, investigate, and regulate a person" operating a pipeline. While this statute outlines the Commission's authority over pipelines, it does not extend any authority to the Organizations to control, investigate, and regulate pipelines or to intervene in pipeline proceedings before the Commission. The Organizations cite no legal authority for the proposition that the Legislature's general grant of regulatory authority to the Commission somehow extends to them a right to intervene in a pipeline relocation proceeding before the Commission. If this were the case, then all persons would fall within the zone of interests of every statute granting the Commission regulatory authority over a utility, and everyone would have the right to intervene in every proceeding before the Commission. No one believes that to be the case.

Likewise, MCL 483.2b does not provide a right to intervene. MCL 483.2b states: "[a] pipeline company shall make a good-faith effort to minimize the physical impact and economic damage that result[s] from the construction and repair of a pipeline." While this provision places a duty on a pipeline company to act in good faith during construction, it does not provide a third person a right to intervene in an application proceeding such as this. Enbridge's application describes in detail the proposed construction activity it will undertake to locate the replacement

pipe segment within the tunnel. The Organizations apparently do not object to the proposed construction activity relating to the replacement pipe segment. Instead, the Organizations' assertions of harm relate to the construction of a tunnel, the continued operation of Line 5, and climate change. Yet, MCL 483.2b only imposes a good-faith duty regarding the construction or repair of pipelines and does not impose a duty relating to the continued operation of a pipeline, managing climate change, or a tunnel that is subject to another agency's authority. These asserted injuries do not fall within the zone of interests to be protected by Act 16.

B. MEPA Does Not Provide a Basis to Intervene

The Organizations also argue that MEPA entitles them to intervene as a matter of right. This argument ignores MEPA's plain language, which only allows for permissive intervention, and then ignores the statutory limitations placed on that permissive intervention. In addition, this argument ignores that the Commission's past practice to deny intervention in Rule 447 cases pursuant to MEPA.

MCL 324.1705(1) states:

> If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, **the agency** or the court **may** permit the **attorney general or any other person** to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that **has, or is likely to have**, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources. [emphasis added.]

The statute on its face states that the agency "may" allow intervention and does not entitle anyone to intervene as a matter of right, as erroneously asserted in the Organizations' petitions.

The Commission's past practice with respect to Rule 447 applications has also been to deny intervention based on MEPA.[4] E.g., *In re Encana Oil & Gas (USA) Inc.* April 16, 2013 Order, Case Nos U-17195 and U-17196. This past practice has been upheld by the courts. In *Buggs v. Public Service Commission*, Nos. 315058, 315064, 2015 WL 159795 at p. 8 (Mich. App. Jan. 13, 2015), the Michigan Court of Appeals stated that to satisfy MEPA, the Commission is not required to grant interventions to third-persons, or even conduct a contested case hearing on the environmental impact of a project.

Even if the Commission were to reverse its past practice and consider granting permissive intervention under MEPA, there are still two reasons why the Organizations fail to meet the statutory requirement for permissive intervention. First, MCL 324.1705(1) allows an agency to "permit the attorney general **or** any other person to intervene as a party." Here, the Attorney General has already filed her notice of intervention on behalf of the people of the State of Michigan. On its face, MEPA allows an agency to permit either the Attorney General "or" another person, but not both. The use of the word "or" is a disjunctive term. *People v. Kowalski*, 489 Mich. 488, 499; 803 N.W. 2d 200 (2011) "The Legislature's use of the disjunctive word 'or' indicates an alternative or choice between two things." *Pike v. Northern Michigan University,* 327 Mich. App. 683, 697; 935 N.W.2d 86 (2019), *quoting Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins*. Co., 500 Mich. 191, 209; 895 N.W.2d 490 (2017) (quotation marks and citation omitted).

[4] A number of the Organizations cite the Commission's February 2020 Order in *In the matter of the application of DTE* Electric Company for approval of its Integrated Resource Plan pursuant to MCL 460.6t and for other relief ("*In re DTE*"), Case No. U-20471, for the proposition that the Commission has allowed intervention pursuant to MEPA in other proceedings and should do so in this proceeding. As an initial matter, the Petition to Intervene of the Environmental Law & Policy Center (April 19, 2019) and Natural Resources Defense Council's Petition to Intervene (April 3, 2019) filed *In re DTE* sought intervention under MCL 460.6s(4) and 6t(7)--not MEPA. In allowing intervenors to raise MEPA-related issues later in that proceeding, the Commission stressed "that Section 6t contains significant environmental mandates which apply to IRP applicants," and specifically distinguished IRP cases from other proceedings before the Commission. Id. at p.43. Unlike IRP cases, Act 16 and Rule 477 applications do not contain those significant environmental mandates.

Once the Attorney General intervenes on behalf of the people of the State of Michigan as she has done in this case, MEPA no longer permits other persons to permissively intervene.[5] While MEPA contemplates persons may act as "private attorneys general" under the statute, this is prohibited by the statute once the Attorney General actually intervenes. Such a regime makes sense, as it prohibits duplicative and needlessly cumulative litigation filings when the Attorney General is already protecting the interests MEPA seeks to protect (though, as noted above and in Enbridge's response to the AG's Notice of Intervention, this proceeding has nothing to do with MEPA).

The Organizations also fail to meet a second statutory requirement for permissive intervention, which is to "file a pleading asserting that the proceeding involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources." Enbridge's application seeks authority to locate a replacement pipe segment within a utility tunnel to protect the Great Lakes, which will fulfill the legislatively determined public policy objective envisioned by Act 359. The Organizations have not asserted that the replacement pipe segment being located within the tunnel "has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources." Quite the opposite, relocating the pipeline within the tunnel will, as recognized by the State of Michigan, "essentially eliminate the risk of adverse impacts that may result from a potential release from Line 5 at the Straits." (The Second Agreement, Exhibit A-10, p.3.). Instead, the Organizations' alleged harms are all unrelated to the relief requested in Enbridge's application, and therefore fail to meet the statutory requirement in MEPA for permissive intervention.

[5] Not only is there no statutory basis for their permissive intervention, there is also no value to the Organizations' intervention because the Attorney General seeks to raise the same issues under MEPA as they seek to raise.

C. THE ORGANIZATIONS DO NOT MEET THE PERMISSIVE INTERVENTION STANDARD

The Commission occasionally grants permissive intervention where a person cannot satisfy the two-pronged test for standing as of right, if public policy otherwise warrants the person's involvement. In its June 30, 2020 Order in this proceeding, the Commission stated that "[r]equests for intervention will be evaluated by the ALJ based on the Commission's standards." June 30, 2020 Order in Case U-20763 at pp. 70 – 71. The Commission then described that permissive intervention was appropriate where: (1) a proceeding raises novel questions and important issues of policy, **and** (2) the petitioner will bring a unique perspective to the issues raised by the case. *Id.* In its June 30, 2020 Order in this proceeding, the Commission acknowledged "the significance of this proceeding and the novel legal questions that may arise." *Id,* p. 70. Thus, the determining factor for granting permissive intervention is whether the Organizations bring a unique perspective to the issues raised by Enbridge's application.

The actual issue in this case is narrow: should Enbridge be granted the authority to relocate the portion of Line 5 currently on the floor of the Straits within a tunnel in furtherance of the State's policy objective to alleviate a perceived risk to the Great Lakes? In their petitions, the Organizations do not offer a unique perspective as to this issue, but instead seek to offer their unique perspectives on a host of issues unrelated to the relief requested in Enbridge's application.

In proceedings addressing permissive intervention, the Commission has made clear that the "unique perspective" offered by a proposed permissive intervenor must relate to "the issues raised by the case." *In re Masotech Forming Technologies*, Case No. U-11057, Order, June 5, 1996 at p. 3. The Commission also applies "a balancing test that weighs any benefit expected to be derived by allowing the intervention against the potential delay and expense expected to accompany the involvement of the intervenor." *In re International Transmission Co*, at p. 4. Here,

the Organizations seek to litigate issues entirely outside of the scope of the application and the Commission's jurisdiction, such as the environmental impact of the tunnel construction, the continued operation of Line 5, its safety, and climate change. In applying the balancing test to determine whether to grant permissive intervention, there is no benefit derived by allowing the Organizations to intervene to raise these totally extraneous issues, yet the potential delay and expense is great.

Furthermore, the Attorney General has intervened on behalf of all the people of Michigan and the Tribes also seek intervention. The Organizations have not shown any unique perspective to be brought to the actual issues in this proceeding, that will not be offered by the Attorney General or the Tribes. Instead, they seek to bring their unique perspective to issues which are entirely outside the scope of this proceeding.

D. AT A BARE MINIMUM, INTERVENTION MUST BE LIMITED

Rule 412(1) provides that an administrative law judge "shall grant or deny, in whole or in part, a petition for leave to intervene **or, if appropriate, may authorize limited participation**." R 792.10412(1); emphasis added. For the reasons set forth above, the Organizations' petitions to intervene should be denied. At a bare minimum, the Organizations' intervention must be limited to the issues actually raised by Enbridge's application, which is whether Line 5 - specifically the replacement pipe segment - should be relocated within a tunnel. In past Act 16 applications, the Commission stated that the relevant issues are whether "(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." *In re Enbridge Energy Limited Partnership*, Case No. U-17020, January 31, 2013,

Order, p. 5. If allowed to participate, the Organizations' participation should be limited to these issues with respect to the replacement pipe segment.

The Organizations should not be allowed to raise issues relating to -- or seek any affirmative relief regarding -- the current or continued operation of Line 5 or the safety of Line 5. These issues are clearly outside the scope of this proceeding. In addition, the Commission rules unequivocally require that a person "shall set out clearly and concisely" their positions and if affirmative relief is sought, then the petition "shall specify that relief." Rule 410(2) states:

> A petition for leave to intervene **shall set out clearly and concisely** the facts supporting the petitioner's alleged right or interest, the grounds of the proposed intervention, and **the position of the petitioner** in the proceeding **to fully and completely advise the parties** and the commission of the specific issues of fact or law to be raised or controverted. **If affirmative relief is sought, the petition** for leave to intervene **shall specify that relief**. Requests for relief may be stated in the alternative. R 792.10410(2); emphasis added.

Ignoring these mandatory disclosure requirements, the Organizations seek to assert undisclosed positions at some undetermined future time in this proceeding about the current and continued operation of Line 5 and the safety of Line 5. For example, the MEC petition states "MEC plans to evaluate Enbridge's application, testimony, and exhibits, and to conduct discovery, and then to raise those issues and **take those positions that best serve the interests** described above." *Id*. at p. 10, ¶ 21; emphasis added. Similar, if not identical, statements are in the other Organizations' petitions. See, ToMWC at p. 7 ¶ 22; NWF at p. 6 ¶ 18; and EL&PC and MCAN at p. 10 ¶ 20. These intentionally open-ended and vague statements of possible positions which will be taken, but not disclosed until sometime later in the litigation, directly conflicts with the requirements of Rule 410(2).

The Organizations should not be allowed to strategically delay, raising their actual positions and the potential affirmative relief that they may seek until later in the proceeding; that would directly violate Rule 410(2). If intervention is granted to the Organizations, then the Organizations must be limited to either supporting or opposing the application based on the three Act 16 criteria that have been established by the Commission: whether "(1) the applicant has demonstrated a public need for the proposed pipeline [i.e., replacement pipe segment], (2) the proposed pipeline [i.e., replacement pipe segment] is designed and routed in a reasonable manner, and (3) the construction of the pipeline [i.e., replacement pipe segment] will meet or exceed current safety and engineering standards, and they should not be allowed to seek any affirmative relief with regard to the continued operation of Line 5.[6]

In addition, the Organizations should not be allowed to raise issues relating to the tunnel, because the Commission has no statutory authority over the tunnel's construction and the tunnel construction is not part of Enbridge's application. The Michigan Legislature has established the creation of the utility tunnel. The Michigan Legislature has vested authority over the tunnel in the MSCA. Act 359 unequivocally grants the MSCA the authority "to acquire, construct, operate, maintain, improve, repair, and manage [the] tunnel." MCL 254.324a(1), MCL 254.324d(1). After the tunnel's construction, it will be owned by the MSCA. (Tunnel Agreement, Exhibit A-5.) To the extent the Organizations wish to address the environmental impacts of the tunnel construction, they may do so in the permit proceedings before EGLE and USACE. Issues relating to the tunnel

[6] More importantly, there is no statutory basis in Act 16, and none has been cited, to interfere with the current operation of Line 5 or to rescind or revoke a prior approval for a pipeline. Even if such a provision existed, which it does not, the Organizations would lack standing to assert it. See, *Michigan Bell Telephone Co., v Public Service Commission*, 214 Mich. App. 1, 5-6; 542 NW.2d 279 (1996) (where the court held that permissive standing is not permitted in a contested case where a party seeks to impose a penalty or revoke an existing right). Finally, the procedural safeguards required by the Administrative Procedures Act would require notice of the statutory and factual basis for the revocation along with an informal hearing before a contested case could even begin to revoke a prior approval of a pipeline. See, MCL 24.292(1); MCL 24.205(a) and *Rogers v. Michigan State Board of Cosmetology*, 68 Mich. App. 751; 244 N.W.2d 20 (1976).

construction are outside the scope of the Commission's jurisdiction and this proceeding, and the Organizations should not be allowed to raise them.[7]

In their petitions, the Organizations also wish to raise issues regarding the safety of Line 5's current operations. However, any concerns with the safety of Line 5's current operations are not issues within the scope of this Commission proceeding, which concerns only the relocation of a pipeline. To the extent the Organizations have issues with the safety regarding the current operation of Line 5, they are free to address those issues with the federal agency assigned responsibility over the safety of interstate pipelines, Pipeline and Hazardous Materials Safety Administration.

Finally, all intervenors should be: (1) required to coordinate their cross-examination of witnesses, (2) prohibited from engaging in friendly cross-examination of each other's witnesses and (3) required to file consolidated briefs. Four of the Organizations are represented by the same law firm and the other two are represented by the same attorney. There is simply no need to have witnesses cross-examined by multiple attorneys from the same law firm when the Organizations

[7] Some petitioners may attempt to argue that Act 359 requires Commission approval of the tunnel itself based on Section 14d(4)(g) of Act 359, which provides that the tunnel agreement "does not exempt any entity that constructs or uses the utility tunnel from the obligation to obtain any required governmental permits or approvals for the construction or use of the utility tunnel." MCL 254.324d(4)(g). On its face, however, this provision does not vest this Commission with any additional authority, other than what already exists, and nothing in Act 16 provides the Commission with authority over the tunnel. In an effort to extend Act 16 authority over the tunnel, some petitioners may also argue that the tunnel should be treated as a fixture or equipment appurtenant to Line 5. The tunnel, however, is not a fixture or equipment appurtenant to Line 5. The tunnel is a standalone structure, distinct from the pipeline and other utility lines that may be placed within it and is to be used to house a variety of utility infrastructure. MCL 254.324(e). This statutory definition of the utility tunnel is wholly inconsistent with any argument that the tunnel is somehow a fixture or equipment appurtenant to Line 5. In addition, MSCA has the authority to "acquire" and "operate" the tunnel, to charge utilities fees for the tunnel's use, and to also lease the tunnel to utilities. MCL 254.324a; MCL 254.324d(1). As such, the characterization of it as a mere fixture is inconsistent with the tunnel as a structure whose ownership is distinct from the replacement pipe segment owned by Enbridge. This argument also ignores the plain meaning of the terms "fixture" or "appurtenance." A "fixture" is a thing that, though originally a movable good, is, by reason of its annexation to land, regarded as a part of the land. *Wood Hydraulic Hoist & Body Co. v. Norton*, 269 Mich. 341, 257 N.W. 836 (1934). Here the "tunnel" is not "a movable good," but instead, an underground structure with its very existence dependent upon it being located underground and is incapable of being a movable good. Similarly, the tunnel is not equipment appurtenant to Line 5. The term "equipment" means "goods other than inventory, farm products, or consumer goods." MCL 440.9102(gg). The term "goods means all things that are movable." MCL 440.9102(qq).

are advocating the same positions. The Organizations should be required to select one attorney to cross-examine each opposing witness. Likewise, they should be prohibited from engaging in friendly cross-examination of each other's witnesses. Finally, there is no reason to have separate briefs filed by each Organization. They should be required to file a single consolidated brief at each stage of the briefing schedule to avoid unduly burdening the Commission and other parties with duplicative arguments and briefs.

III. RELIEF REQUESTED

WHEREFORE, Enbridge Energy, Limited Partnership, respectfully requests that:

A. The Organizations' request to intervene as a matter of right be denied;

B. The Organizations' request to intervene based on the Michigan Environmental Policy Act be denied;

C. The Organizations' request for permissive intervention be denied;

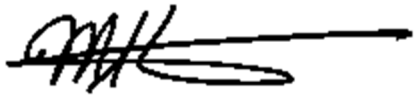
D. If the Organizations are granted intervention, then their intervention be limited to the relevant issues in this Act 16 proceeding which are: (1) is there a public need for the Project, (2) is the replacement pipe segment designed and routed in a reasonable manner, and (3) will the construction of the replacement pipe segment meet or exceed current safety and engineering standards;

E. If the Organizations are granted intervention, then they be prohibited from raising issues regarding the construction of the tunnel, the continued operation of Line 5, the safety of Line 5's current operations, and climate change; and

F. The Organizations must be required to select one attorney to cross-examine each opposing witness, be prohibited from engaging in friendly cross-

examination of each other's witnesses, and be required to file joint consolidated briefs.

Respectfully submitted,



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Dated: August 11, 2020

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