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September 2, 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 ***Enbridge Energy, Limited Partnership's Motion in Limine*** and Certificate of Service of same.

Thank you.

Very truly yours,

Fraser Trebilcock Davis & Dunlap, P.C.

Michael S. Ashton

Michael S. Ashton
Digitally signed by Michael S. Ashton
Date: 2020.09.02 15:39:30 -04'00'

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	)	

APPLICANT ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S MOTION *IN LIMINE* AND SUPPORTING BRIEF

Pursuant to Rules 403, 427, and 432 of the Rules of Practice and Procedure before the Commission, R 792.10403, R 792.10427, and R 792.10432, Enbridge Energy, Limited Partnership ("Enbridge") moves for an order *in limine*[1] to exclude certain evidence and issues that are beyond the scope of this proceeding. Specifically, Enbridge seeks an order directing that the following issues be excluded as legally irrelevant to this proceeding: (1) the construction of the utility tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4) the current operational safety of Line 5, (5) whether Line 5 has an adverse

[1] A "motion *in limine*" refers to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered. *Luce v United States*, 469 US 38, 40 n2 (1984); see also *Lapasinskas v Quick*, 17 Mich. App. 733; 170 N.W.2d 318 (1969). Motions *in limine* are well-established in common law and fall within the Commission's authority to manage the course of hearings. MRE 104(a) supports bringing motions *in limine*. Motions *in limine* are generally used to ensure evenhanded and expeditious management of hearings by eliminating evidence that is clearly inadmissible. See*, e.g., Nelson v American Sterilizer Co.*, 212 Mich. App. 589; 538 N.W.2d 80 (1995). Only relevant evidence is admissible. MRE 402. Here, issues outside of the Commission's jurisdiction are not relevant to this proceeding.

impact on climate change, and (6) the intervening parties' climate change agendas. Enbridge also supports the Commission's issuance of an order directing that the proceeding be limited, consistent with Commission precedent, to the following three issues: (A) is there a public need to replace the existing Line 5 crossing of the Straits with a pipe segment relocated in a utility tunnel beneath the Straits, (B) is the replacement pipe segment designed and routed in a reasonable manner, and (C) will the construction of the replacement pipe segment meet or exceed current safety and engineering standards? See *In re Enbridge Energy Limited Partnership*, Case No. U-17020, January 31, 2013 Order, p. 5. See also, *In re Wolverine Pipeline Co.,* Case No. U-13225. July 23, 2002 Order, at p.p. 4 -5. In support of this motion, Enbridge states as follows:

I. INTRODUCTION

Enbridge files this motion *in limine* because certain intervening parties have little or no interest in litigating the actual issue Enbridge's application presents. Instead, they urge the Commission to second-guess the Legislature's enactment of the law that expressly authorizes the construction of the tunnel and the 2018 Agreements entered by the State concerning the replacement of the Dual Pipelines, raising issues that are both outside the scope of Enbridge's application and the Commission's jurisdiction.

Pursuant to Public Act 16 of 1929 ("Act 16"), Enbridge's application seeks the Commission's approval to relocate an approximately 4-mile segment of existing pipeline within a utility tunnel beneath the Straits of Mackinac. This relocation will allow Enbridge to permanently deactivate Line 5's current crossing of the Straits — consisting of two, 20-inch diameter pipelines referred to as the "Dual Pipelines" — located on the floor of the Straits. The factual and legal issue raised by Enbridge's application are straightforward and simple: Should Enbridge be allowed to relocate Line 5's Straits pipelines within a utility tunnel, so that it may discontinue the

operation of the Dual Pipelines, consistent with the State of Michigan's authorization of the project by statute and the 2018 agreements entered with Enbridge?

The relocation of Line 5's Straits crossing into the tunnel serves the public need by providing greater protection to the Great Lakes. The Legislature specifically authorized a utility tunnel that would house Line 5 (and possibly other utility lines to be built) and assigned oversight of the "construction" and "operation" of the proposed utility tunnel to a newly created Authority known as the Mackinac Straits Corridor Authority or Corridor Authority. That legislation, Public Act 359 of 2018 ("Act 359"), provided that the Corridor Authority should address a key issue that intervenors now seek to address in this proceeding. Specifically, Section 14d(4)(d) assigns to the Corridor Authority alone the responsibility for entering into an agreement for construction of a "utility tunnel" which ensures that the 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). The Legislature's assignment of these responsibilities with respect to the "tunnel" to the Corridor Authority precludes the Commission (which lacks any specific authority to regulate the construction of a utility tunnel) from seeking to review the same issues, including intervenors' issue (1) above, (construction of the utility tunnel).

With respect to issue (2) above (environmental impact of tunnel construction), Act 359 and the 2018 Agreements require that Enbridge seek appropriate permits for the tunnel construction, which, as discussed further below, implicates the permitting authority of the Michigan Department of Environment, Great Lakes and Energy ("EGLE") and the US Army Corps of Engineers ("Corps"). These agencies will undertake appropriate environmental review under relevant laws as part of their tunnel permitting responsibilities. Thus, aside from the fact that the Commission

has no authority to approve or disapprove the utility tunnel's construction, it would be wasteful and inappropriate to inject another environmental review of the tunnel into this proceeding.

With respect to issue (3) above (the public need for continued operation of Line 5), the Commission already made the required determination of need in 1953 when Line 5 was first approved. In its 1953 Order (Exhibit A-3), the Commission approved Line 5's ongoing operation, and there is no substantive or procedural basis to revisit or rescind that authorization in this proceeding, which concerns only the relocation of a 4-mile segment of a 645-mile pipeline. Line 5 continues to operate, and there is no basis for reconsidering that prior determination now.

Finally, topics (4), (5) and (6) (safety of existing Line 5 throughout the State and issues related to climate change) fall far outside the provisions of the Commission's authorizing statute, Act 16, and thus, beyond the scope of this proceeding. In addition, no such review is appropriate here because regulation of the safe operation of Line 5 – whether its 645-mile entirety or the 4-mile replacement segment – is exclusively vested in the Pipeline and Hazardous Materials Safety Administration ("PHMSA") pursuant to the Pipeline Safety Act, 49 U.S.C. §§ 60101, *et seq*. ("PSA"). That Act expressly preempts a state's authority (including any potential authority of the Commission) over the safety of the operation of interstate pipelines. 49 U.S.C. 60104(c). Accordingly, beyond confirming compliance with PHMSA requirements in connection with the replacement pipe segment within the utility tunnel, this proceeding is not an appropriate forum for assessing Line 5's safety.

The climate change issues raised by intervening parties similarly are beyond the scope of Enbridge's application and the Commission's jurisdiction. The purpose of Enbridge's application is to provide greater protection to the Great Lakes by relocating the Line 5 Straits crossing in a utility tunnel. Yet, the intervening parties seek to litigate the wisdom of transporting fossil fuels

in Michigan or elsewhere. The Legislature has already adopted a state policy to create a utility tunnel to protect the Great Lakes, and that policy cannot be frustrated by generalized climate-change concerns that are inconsistent with the Legislature's goals and outside the Commission's jurisdiction.

II. LEGAL ANALYSIS

A. THE CONSTRUCTION OF THE TUNNEL IS OUTSIDE THE SCOPE OF THE CASE

1. Act 359 Specifically Governs the Construction of the Tunnel and Vests Oversight Responsibility in the Corridor Authority

The Commission's authority is limited to those issues that the Legislature delegates to it. As the Michigan Supreme Court has recognized: "The MPSC has no common-law powers; it has only the authority granted to it by the Legislature." *In re Reliability Plans of Electric Utilities for 2017 – 2021,* Nos. 158305, 158306, 158307, 158308, ___ Mich. ____; ___N.W. 2d ____, 2020 WL 1649885 at *11 (Mich. April 2, 2020), *citing Consumers Power Co. v. Public Service Commission*, 460 Mich. 148, 155-56; 596 N.W. 2d 126 (1999). This grant of statutory authority "must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Union Carbide Corp. v. Public Service Commission*, 431 Mich. 135, 151; 428 N.W.2d 322 (1988), *quoting Mason Co. Civic Research Council v. Mason Co.*, 343 Mich. 313, 326-27, 72 N.W.2d 292 (1955). In interpreting a statutory grant of authority, Courts do "not weigh the [underlying] economic and public policy factors," because it is the Michigan Legislature alone "that must consider these questions." *Consumers Power Co. v. Public Service Commission*, 460 Mich. 148, 156; 596 N.W.2d 126 (1999).

Further, by virtue of Act 359, oversight over the construction of the tunnel is vested in the Corridor Authority, which has the power to "acquire, construct, operate, maintain, improve, repair

and manage the utility tunnel." MCL 254.324a(1) and MCL 254.324d(1). Here, the "clear and unmistakable language" of Act 359 vests the Corridor Authority with the authority to oversee the construction of the tunnel and makes no reference whatsoever to this Commission having any such authority over the tunnel. As a result of Act 359's plain language, the Corridor Authority, and not the Commission, has authority over the acquisition, construction, operation, maintenance, and management of the utility tunnel. Accordingly, all those matters are outside the scope of this case and should not be considered.

Some intervenors may erroneously argue that Act 359 requires Commission approval based on Section 14d(4)(g) of Act 359, which provides that the tunnel agreement authorized by Act 359 "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."[2] MCL 254.324d(4)(g). But on its face, this provision does not vest this Commission with any additional authority. Moreover, other agencies do have environmental review and permitting authority over the construction of the tunnel, namely EGLE and the Corps, and in accordance with the Tunnel Agreement and Section 14d(4)(g) of Act 359, Enbridge applied for those permits. See EGLE Submission No. HNY-NHX4-FSR2Q (seeking Part 303 and Part 325 permits); EGLE Submission No. HNY-TBJC-PNK8V (seeking National Pollutant Discharge Elimination System permit); Corps File No. LRE-2010-00463-56-A19 (seeking Section 404 and Section 10 permits). By contrast, and as discussed below, Act 16 does not vest this Commission with permitting or

[2] To the extent that intervenors argue that the Commission has already determined that the tunnel construction is part of this proceeding based on the Commission's June 30, 2020 Order regarding Enbridge's request for declaratory ruling, they ignore that the June 30, 2020 Order, at page 58, explicitly states that the Commission did not address this issue, stating: "The Commission notes that there were many comments regarding the tunnel. The issue of whether the tunnel is within the scope of the Commission's review under the Act 16 application is not material for the Commission's determination on this declaratory request."

environmental review authority over the tunnel, and only requires Enbridge to obtain approval from this Commission to relocate the Straits crossing within the tunnel.[3]

2. Act 16 Does Not Vest the Commission Authority Over the Tunnel

Enbridge expects the intervenors to advance three arguments that Act 16 provides the Commission authority over the construction of the tunnel. These arguments rely on: (1) the broad grant of power described in Section 3 of Act 16, being MCL 483.3; (2) the Commission's jurisdiction over fixtures and equipment appurtenant to a pipeline set forth in Sections 1(2) and 6 of Act 16, being MCL 483.1(2) and MCL 483.6; and (3) the requirement to minimize the physical impact resulting from the construction of a pipeline set forth in Section 2b of Act 16, being MCL 483.2b. None of these Act 16 provisions provide the Commission jurisdiction over the tunnel's construction.

a. The broad grant of power described in MCL 483.3 does not provide the Commission authority over the tunnel

Section 3 of Act 16 provides that "the commission is granted the power to control, investigate, and regulate a person doing … exercising or claiming the right to carry or transport crude oil or petroleum …." MCL 483.3(1)(a). On its face, this provision relates to the transportation of crude oil and petroleum, not the utility tunnel's construction. To meet the test set forth in *Union Carbide Corp. v. Public Service Commission*, 431 Mich. 135, 151; 428 N.W.2d 322 (1988), the Commission's authority "must be conferred by clear and unmistakable language, since a doubtful power does not exist." Here, there is no clear and unmistakable language in Act

[3] For example, when a utility locates a line within a road right-of-way or over a bridge, the Commission does not assume any regulatory authority over the road or bridge. The same is true here with respect to the utility tunnel.

16 granting any authority over the tunnel's acquisition, approval, or construction. As a result, no such authority exists.

Further, the Supreme Court has rejected arguments that broad statutory provisions outlining the Commission's authority, like Section 3, should be treated as a grant of specific authority. In *Huron Portland Cement Co. v. Public Service Commission,* 351 Mich. 255; 88 N.W.2d 492 (1958), the Court held that the Commission had no authority to require a utility to provide service to a customer based on a statute broadly stating that the "commission is hereby vested with complete power and jurisdiction to regulate all public utilities." MCL 460.6. The Court required the Commission's authority to come from a specific grant:

> **The broad language, however, furnishes no grant of specific powers.** It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect of vesting particular, specific, powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards … but there would have been no need whatever for the many statutes enacted … vesting specific powers in the commission. (*Id.*, at 263, citations omitted, emphasis added.)

Accord Consumers Power Co. v. Public Service Commission, 460 Mich. 148; 596 N.W.2d 126 (1999) (rejecting the claim that the Commission could require a utility to distribute electricity generated by a third party without a specific statute granting such authority.) The lack of a specific statutory grant of authority over the tunnel means the Commission lacks that authority.

Further, given the specific grant of powers to the Corridor Authority in Act 359 to oversee the tunnel's construction, any argument that the general language in MCL 483.3(1)(a) provides the Commission with its own authority over the tunnel fails. In *Tyra v. Organ Procurement Agency of Michigan*, 498 Mich. 68, 94; 869 N.W.2d 213 (2015), the Court stated that the "more specific statutory provisions control over more general statutory provisions," quoting *Boodt v. Borgess Med. Ctr*., 482 Mich. 1001, 1002; 756 N.W.2d 78 (2008) (Markman, J., concurring). Here, the

statutory language specifically and unequivocally granting oversight authority over the tunnel to the Corridor Authority controls over any implication that intervenors may want to draw from a general provision in Act 16. Accepting the intervenors' argument would unlawfully countermand the specific and unequivocal jurisdiction that the Legislature conferred on the Corridor Authority alone.

b. The tunnel is not a fixture or equipment appurtenant to the pipeline

Some intervenors may erroneously argue that the Commission has jurisdiction over the utility tunnel's construction because the tunnel should be considered a "fixture" or "equipment appurtenant" to Enbridge's pipeline pursuant to Section 1(2) of Act 16, which provides that a person does not "possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, … except as authorized by and subject to this act." MCL 483.1(2). The intervenors may similarly rely on language in Section 6 which states that before a person has a "right to locate, maintain, or operate pipe lines, fixtures or equipment appurtenant thereto" the person must file "an explicit authorized acceptance of the provisions of this act." MCL 483.6. These arguments fail because the tunnel, which is being constructed pursuant to Act 359, is neither a "fixture" nor "equipment appurtenant" to Enbridge's pipeline.

At the outset, the utility tunnel is being constructed pursuant to Act 359 and is a standalone structure. Act 359 defines the "utility tunnel" as being "a tunnel joining and connecting the Upper and Lower Peninsulas of this state at the Straits of Mackinac for the purpose of accommodating utility infrastructure, including, but not limited to, pipelines, electric transmission lines, facilities for the transmission of data and telecommunications…." MCL 254.324(e). Far from being a fixture or equipment appurtenant to Line 5, the utility tunnel is its own structure to be used to house a variety of utility infrastructure. This statutory definition is inconsistent with any argument

that the tunnel is somehow a mere fixture or equipment appurtenant to Line 5. The Legislature also has given the Corridor Authority exclusive power to "acquire" and "operate" the tunnel, to charge utilities fees for the tunnel's use, and to lease the tunnel to utilities. MCL 254.324a; MCL 254.324d(1). As Act 359 establishes, the tunnel is to be separately owned and controlled by the Corridor Authority, and these characteristics are inconsistent with the tunnel being treated as a mere "fixture" of or "equipment appurtenant" to Line 5.[4]

c. The requirement to minimize the physical impact of the construction of pipeline in MCL 483.2b does not provide authority over the tunnel

Finally, some intervenors may argue that the Commission has authority over the utility tunnel based on Section 2b of Act 16, which states: "A pipeline company shall make a good-faith effort to minimize the physical impact and economic damage that result from the construction and repair of a pipeline." MCL 483.2b. While this provision places a duty on a pipeline company to act in good faith during pipeline construction, its plain language does not place any duty on how Enbridge—and more importantly on how the Corridor Authority—constructs the tunnel. Section 2b's plain language is specifically limited to "the construction and repair *of a pipeline*." The construction of the multi-purpose utility tunnel to be owned by the Corridor Authority, on the other hand, is specifically governed and created by Act 359 and jurisdictionally vested with the Corridor Authority. The limited provision of Section 2b, explicitly limited to pipelines, does not extend Commission authority over the utility tunnel's construction.

[4] 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 and belonging, in the ordinary case at least, to the person or persons owning 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, which makes it incapable of being a movable good. Similarly, the tunnel is not equipment appurtenant to Line 5.

B. MEPA DOES NOT EXTEND COMMISSION AUTHORITY OVER THE ENVIRONMENTAL IMPACT OF THE TUNNEL CONSTRUCTION

Since the Commission does not have jurisdiction over the construction of the utility tunnel, MEPA does not magically expand the Commission's authority to review the tunnel construction's environmental impact or feasible alternatives. MEPA requires agency consideration of the "conduct" under administrative review before the agency. Here, that conduct is the relocation of the replacement pipe segment within the tunnel, not the actual tunnel construction.

MEPA requires limited consideration of the environmental impact of the conduct subject to an agency's review. MCL 324.1705 provides:

> (1) 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**.
>
> (2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and **conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare**.
>
> (3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

As recognized by a 2009 Opinion of the Attorney General, a MEPA analysis is "based on specific conduct" that is subject to review by the agency. (2009 OAG 7224 at pp. 6-7; Attachment A.) MEPA does not grant administrative agencies roving authority to consider environmental impacts of activities or conduct that are not within the agencies' jurisdiction.

As explained above, the Commission lacks jurisdiction over the utility tunnel's construction. Accordingly, there is no jurisdictional basis for the Commission to determine, under MEPA, if the tunnel construction "involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying …natural resources." The Commission's MEPA inquiry is limited to the conduct over which it has jurisdiction, *i.e.*, the construction and relocation of the replacement pipe segment and not the tunnel's construction itself. The tunnel construction is wholly outside the Commission's authority and delegated instead to the Corridor Authority.[5]

Further, MEPA's goals will be met with respect to the tunnel by the environmental reviews that will be undertaken by the agencies permitting the tunnel, EGLE and the Corps. For example, EGLE has stated that in processing Enbridge's tunnel application, it will determine whether the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible, and also whether there are any feasible or prudent alternatives.[6] The Corps will also undertake an environmental review consistent with the National Environmental Policy Act and consider whether the tunnel presents the least environmentally damaging practicable alternative.[7] Thus, the tunnel will not escape environmental review or an alternatives analysis.

[5] A number of petitions to intervene 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, in an effort to expand the scope of MEPA review in this case. *In re DTE* 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 applications do not contain those significant environmental mandates.

[6] See https://www.michigan.gov/line5/0,9833,7-413-99949-528646--,00.html

[7] See https://www.lre.usace.army.mil/Portals/69/docs/regulatory/PN/20100046356A19Extension.pdf?ver=2020-06-01-092659-510

C. THE PUBLIC NEED FOR LINE 5, AND ITS CONTINUED AND SAFE OPERATION, ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

Several intervenors are attempting to use this proceeding to relitigate the public need for Line 5 or to litigate issues regarding the continued operation of Line 5 or the safety of the Line's operation. For example, the National Wildlife Federation asserts that its members "have the potential to be harmed if Line 5 continues to operate," and they "face the prolonged risk" of "harm caused by the continued operation of Line 5." (Petition to Intervene at pp. 2-3 ¶¶7 and 10; accord Petitions of Tip of the Mitt at p. 3, ¶10, Michigan Environmental Council p. 3 ¶9, and Environmental Law & Policy Center and Michigan Climate Action Network, p. 7 ¶13.) But none of these issues are properly before the Commission in this proceeding because this Commission long ago conclusively determined the public need for Line 5, and Line 5's safety is neither a Commission issue nor a state law issue.

This Commission has already granted approval "to construct, operate and maintain [Line 5] as a common carrier" within Michigan. (Exhibit A-3; March 31, 1953, Opinion and Order, D-3903-53.1, at page 9.) In approving Line 5, the Commission specifically rejected as "without merit" a motion to dismiss asserting that Line 5 was "not in the public interest." (*Id.*, at page 8.) Likewise, in *Lakehead Pipe Line Co v Dehn*, 340 Mich. 25, 37-42; 64 N.W. 2d 903 (1954), the Michigan Supreme Court conclusively held that the construction and operation of Line 5 was "for a public use benefiting the people of the State of Michigan." Further, the Legislature confirmed the continued need for Line 5 when it enacted Act 359 in 2018, authorizing a replacement pipe segment to be relocated in a tunnel under the Straits. Accordingly, the public need for Line 5 has been conclusively established and is not subject to re-litigation or reexamination in this proceeding, because Enbridge is simply requesting the authority to relocate the Line 5 Straits crossing, as required by the State of Michigan.

Importantly, there is no statutory basis in Act 16 - - and none has been cited in any of the petitions to intervene - - to interfere with the current operation of Line 5 or to rescind or revoke a prior approval for a pipeline. What's more, the procedural requirements and safeguards the Administrative Procedures Act imposes for any such actions cannot be met in this proceeding even if those matters were relevant to this proceeding, which they are not. 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). The public need for Line 5 or its continued operations are outside this proceeding's scope.

Further, some intervenors desire to raise issues regarding the alleged safety of Line 5's current operations. (See*, e.g.*, petitions to intervene of the National Wildlife Federation at p. 2 ¶7, Tip of the Mitt at p. 3, ¶10, Michigan Environmental Council p. 3 ¶9, and Environmental Law & Policy Center and Michigan Climate Action Network, p. 7 ¶13.) Because the PSA provides PHMSA with exclusive jurisdiction to regulate the safety of interstate pipelines, and that Act preempts a state's authority over the safe operation of interstate pipelines, this issue is far outside this proceeding's scope. The PSA unequivocally states that: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c).[8]

The PSA preempts all state laws and actions that seek to regulate interstate pipeline safety in purpose or effect, and "leaves no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards." *Kinley Corp. v. Iowa Utilities Bd., Utilities*

[8] The PSA gives PHMSA the authority to set safety standards that apply to "the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." *Id.* § 60102(a)(2). These standards must be "practicable" and "must meet the need for . . . safely transporting hazardous liquids" and "protecting the environment." *Id.* § 60102(b)(1).

Div. Dep't of Commerce, 999 F.2d 354, 359 (8th Cir. 1993). See also *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), and *Williams v. City of Mounds*, 651 F.Supp. 551 (D. Minn 1987) (both holding that state and local agencies lack authority to address interstate pipeline safety concerns). Accordingly, any allegations regarding the safety of Line 5's current operations are not within the proper scope of this proceeding or the Commission's jurisdiction. To the extent the intervenors have issues with the safety of Line 5's current operation, they are free to address those issues with the federal agency assigned responsibility over the safety of interstate pipelines: PHMSA.[9]

D. CLIMATE CHANGE IS OUTSIDE THE SCOPE OF THIS PROCEEDING

Several intervenors oppose Enbridge's application to relocate Line 5 within a tunnel based on their opposition to the use of fossil fuels and their generalized concerns regarding climate change. For example, the Environmental Law and Policy Center and the Michigan Climate Action Network assert harms caused by climate change and extreme weather events. (Petition at pp. 6 - 7, ¶ ¶ 12 and 13.) Similarly, others argue that 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." (Petitions of National Wildlife Federation pp. 2-3, ¶ 7; see also Michigan Environmental Council p. 3 ¶ 9; Tip of the Mitt Watershed Council p. 3 ¶ 10; and For the Love of Water p. 3 ¶ 4.)

But Enbridge's application and this proceeding have nothing to do with climate change or the intervening parties' climate-change agendas. The purpose of Enbridge's application is to provide greater environmental protection to the Great Lakes by relocating the Line 5 Straits

[9] PHMSA has the authority to issue safety orders directing pipeline operators to "take necessary corrective action, including physical inspection, testing, repair or other appropriate action." *Id.* § 60117(l).

crossing in a utility tunnel where the line cannot be touched by anchor strikes. Nothing in Act 16 provides the Commission with authority to deny the approval of the location of a pipeline due to generalized concerns over climate change, and the intervenors cite no such authority. To be sure, Act 16 does impose limited requirements on pipelines, such as acting as common purchaser (MCL 483.4), acting as a common carrier (MCL 483.5) and making certain filings with the Commission (MCL 483.6). But, Act 16 places no requirement on pipelines to mitigate the effect of climate change and provides the Commission no authority to deny an application on that basis.

The issues that cause climate change, such as consumers and businesses' continued reliance on fossil fuels, or whether consumers "transition to cleaner and more-cost-effective low-carbon sources of energy," or overall societal "efforts to mitigate the effects of climate change," are not before the Commission and outside this proceeding's scope. The Commission's decision as to whether the relocation of Line 5 within a utility tunnel protects the Great Lakes and effectuates the Legislature's goals is wholly unrelated to the conduct of consumers and businesses as to whether they continue to use or not use fossil fuels, transition to low-carbon sources of energy, or undertake efforts to mitigate the effects of climate change. The decision of consumers and businesses to use fossil fuels is conduct that is not within the scope of this proceeding, not subject to the Commission's jurisdiction, and not within the Commission's control.

Further, to the extent that any intervenors assert that the relocation of the Line 5 Straits crossing into a tunnel will prolong the use of Line 5, there is no merit to that claim because the Dual Pipelines can continue to operate even if the relocation permission sought here were denied.

E. THE COMMISSION HAS DETERMINED THE PROPER SCOPE OF ACT 16 PROCEEDINGS

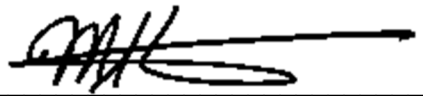
In *In re Enbridge Energy Limited Partnership*, Case No. U-17020, January 31, 2013, Order, p. 5, and *In re Wolverine Pipeline Co*., Case No. U-13225. July 23, 2002 Order, at pp. 4 -

5, the Commission identified those issues which are actually relevant to an Act 16 proceeding. To reiterate, those are: (A) whether there is a public need for the Project — here, to relocate the Line 5 Straits crossing within a tunnel to protect the Great Lakes; (B) the reasonableness of the route for the replacement pipe segment; and (C) whether the construction of the replacement pipe segment will meet or exceed current safety and engineering standards, here, the standards imposed by PHMSA. While some intervening parties may disagree with the utility tunnel's construction and oppose the fossil-fuel industry due to climate change, those disputes and concerns do not expand the scope of the Commission's jurisdiction and should not frustrate the State's goal of protecting the Great Lakes by relocating the Line 5 Straits crossing within a utility tunnel. This proceeding is a narrow, technical examination of Enbridge's proposal to carry out the Legislature's mandate and Enbridge's Agreements with the State of Michigan. It should not be allowed to become a three-ring regulatory circus to litigate the existence or prevention of climate change.

III. RELIEF REQUESTED

WHEREFORE, Enbridge Energy, Limited Partnership, respectfully requests that the administrative law judge grant this motion *in limin*e and direct that the following issues be excluded from this proceeding: (1) the construction of the tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and continued operation of Line 5, (4) the current operational safety of Line 5, (5) climate change, and (6) the intervenors' climate agendas; and direct that the proceeding be limited to whether: (A) there is a public need for the Project, (B) the replacement pipe segment is designed and routed in a reasonable, and (C) the construction of the replacement pipe segment will meet or exceed current safety and engineering standards.

Respectfully submitted,



Dated: September 2, 2020

Michael S. Ashton
Digitally signed by Michael S. Ashton
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ATTACHMENT
A

2009 Mich. OAG No. 7224 (Mich.A.G.), 2009 WL 739959

Office of the Attorney General

State of Michigan
Opinion No. 7224
February 20, 2009

CONST 1963, ART 5, § 8:

***1** The Governor's authority to direct the Department of Environmental Quality to impose certain requirements in the processing of applications for air emissions permits for coal-fired power plants

DEPARTMENT OF ENVIRONMENTAL QUALITY:

EXECUTIVE DIRECTIVES:

GOVERNOR:

SEPARATION OF POWERS:

Executive Directive 2009-2(A) and (D), requiring the Michigan Department of Environmental Quality (DEQ) to determine whether there are more environmentally protective "feasible and prudent alternatives" to constructing a new coal-fired electricity generating plant when evaluating an air emissions permit application under Part 55 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.5501 *et seq*, and further requiring the DEQ to deny a permit if such alternatives exist, impose requirements that are not found in Part 55 of the NREPA or the other provisions of law cited in the directive. Therefore, Executive Directive 2009-2(A) and (D) attempt to amend substantive law contrary to the separation of powers doctrine of Const 1963, art 3, § 2, and are unenforceable.

Executive Directive 2009-2(B) and (C), requiring the Michigan Department of Environmental Quality (DEQ) to make an initial "determination" regarding the "reasonable electricity generation need" of a proposed coal-fired electricity plant and then further requiring the DEQ to consider alternative methods of meeting that need, attempt to impose requirements not found in Part 55 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.5501 *et seq*, or the other provisions of law cited in the directive. Therefore, Executive Directive 2009-2(B) and (C) attempt to amend substantive law contrary to the separation of powers doctrine of Const 1963, art 3, § 2, and are unenforceable.

Although Executive Directive 2009-2 may constitute a formal expression of the Governor's environmental and energy policy preferences, it cannot and does not alter the existing regulatory requirements and procedures applicable to new coal-fired electricity generating plants under Part 55 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.5501 *et seq.*

Honorable Kevin A. Elsenheimer
State Representative
The Capitol
Lansing, MI

Honorable Kenneth Horn
State Representative
The Capitol

Lansing, MI

You have asked several questions concerning Executive Directive 2009-2 (ED 2009-2), issued February 3, 2009, and afforded immediate effect.[1] The directive instructs the Michigan Department of Environmental Quality (DEQ) to make specific determinations when processing applications for the air emissions permits necessary to construct new coal-fired power plants for generating electricity. These permits are issued under Part 55 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.5501 to 324.5542.[2]

***2** ED 2009-2 states, in part:

A. Before issuing a permit to install under Part 55 of the [Natural] Resources and Environmental Protection Act, 1994 PA 451, MCL 324.5501 to 324.5542, for the construction of a new coal-fired electricity generating plant, the [DEQ] *shall determine whether there is a feasible and prudent alternative* consistent with the reasonable requirements of the public health, safety, and welfare that would better protect the air, water, and other natural resources of this state from pollution than the proposed coal-fired electricity generating plant. [ED 2009-2(A); emphasis added.]

Before making that determination, however, the directive requires the DEQ to first make a determination that there is, in fact, a need for the electrical capacity of the coal-fired electricity plant:

B. Before making the determination required by Paragraph A, the Department *shall first determine* whether a reasonable electricity generation need exists in this state that would be served by the proposed coal-fired electricity generating plant. If a reasonable electricity generation need exists in this state, the Department shall estimate the extent of the reasonable electricity generation need. [ED 2009-2(B); emphasis added.]

If the DEQ determines that there is a reasonable need for electricity generation, it must then consider alternative methods of meeting that need:

C. The Department shall next consider alternative methods of meeting the reasonable electricity generation need, including, but not limited to, each of the following:

1. Constructing new electricity generating resources that use technologies other than the burning of coal or that generate electricity from coal using technologies that reduce or sequester emissions.

2. Reducing electricity demand and peak demand through energy efficient programs or load management techniques.

3. Generating or purchasing electricity from existing electricity generating resources. [ED 2009-2(C).]

If, after following the requirements of paragraphs (A), (B), and (C), the DEQ determines that a more environmentally protective feasible and prudent alternative energy source exists, the DEQ must deny the applicant a permit:

D. If the Department determines that a feasible and prudent alternative to the construction of a new proposed coal-fired electricity generating plant exists consistent with the reasonable requirements of the public health, safety, and welfare that would better protect the air, water, and other natural resources of this state than the proposed coal-fired electricity generating plant, *the Department shall not issue a permit to install*. [ED 2009-2(D); emphasis added.]

After reviewing the pertinent language of ED 2009-2, your first three questions regarding the directive may be rephrased and summarized as follows:

When evaluating an air emissions permit application under Part 55 of the NREPA, may the DEQ be directed to:

***3** 1. Determine whether there are "feasible and prudent alternatives" to constructing the power plant and, if there are, deny the permit?

2. Determine whether there is a "reasonable need" for electricity generation in the State and, if so, consider alternative methods of meeting that need?

To answer these questions, it is necessary to review the purpose and legal effect of an executive directive. OAG, 2003-2004, No 7157, p 132 (June 2, 2004), is instructive regarding this issue. That opinion addressed questions regarding Executive Directives 2003-12 and 2003-13, relating to the Michigan Public Safety Communications System Act. One of the questions addressed was "whether the Governor has the authority to amend an existing substantive statute by executive directive consistent with the separation of powers doctrine of Const 1963, art 3, § 2." *Id.* p 137

The opinion noted that the Governor issued those executive directives, as she did here, pursuant to the Governor's power under Const 1963, art 5, § 8, which provides that: "[e]ach principal department shall be under the supervision of the governor unless otherwise provided by this constitution." *Id.* Acknowledging that the plain language of art 5, § 8 does not specifically mention executive directives, OAG No 7157 observed that executive directives "are not provided for as such in the constitution, but rather they have been used historically by governors as one means by which they exercise their supervisory authority" under art 5, § 8 "in the form of internal policy statements." *Id.*[3] The opinion continued by comparing executive directives with executive orders: In contrast to executive *directives*, executive *orders* are specifically provided for in Const 1963, art 5, § 2. This provision was new in the 1963 Constitution and was adopted to facilitate efficiency within the executive branch. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745-746; 330 NW2d 346 (1982). The Governor, through the use of executive orders, may "make changes in the organization of the executive branch or in the assignment of functions among its units." Const 1963, art 5, § 2. Unless disapproved in each house of the Legislature, executive orders acquire the force and effect of law. For this reason, art 5, § 2 has been described as expressly vesting "legislative power" in the Governor without running afoul of Const 1963, art 3, § 2. *Soap & Detergent Ass'n, supra*, 415 Mich at 752; *House Speaker v Governor*, 443 Mich 560, 578; 506 NW2d 190 (1993). [*Id.* Emphasis in original; footnote omitted.]

Turning to the separation of powers doctrine, OAG No 7157 continued:
Const 1963, art 3, § 2, provides for the separation of governmental powers, stating that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch *except as expressly provided by this constitution*." No provision of the constitution vests legislative power in the Governor with respect to executive directives. Accordingly, in the absence of a constitutional provision like art 5, § 2 expressly conferring legislative power on the Governor, executive directives cannot amend substantive law. [*Id.* Emphasis in original.]

***4** Applying these principles to ED 2003-12 and ED 2003-13, OAG No 7157 analyzed the language of the two directives, observing that:
ED 2003-12, as originally issued, used the mandatory "shall" in connection with allowing the installation of Agency equipment upon [Michigan Public Safety Communications System] towers, whereas MCL 28.283(2) uses the permissive "may." The Governor cannot, by executive directive under Const 1963, art 5, § 8, or by executive order under Const 1963, art 5, § 2, change substantive law that does not directly relate to the exercise of her *reorganization* authority. Changing a duty from one involving the exercise of discretion to one purporting to remove such discretion would change substantive law and exceed the Governor's authority. [*Id.* p 138. Citation omitted; emphasis in original.]

The opinion concluded, however, that because ED 2003-12 was superseded by ED 2002-13, and the latter no longer used the mandatory "shall," ED 2003-13 was consistent with MCL 28.281 to 28.283, and thus did not alter substantive law relating to the operation of the Michigan Public Safety Communications System Act:

It is my opinion, therefore, in response to your second question, that an executive directive issued in the exercise of the Governor's supervisory authority under Const 1963, art 5, § 8, does not have the force and effect of law and cannot amend a state statute consistent with the separation of powers doctrine embodied in Const 1963, art 3, § 2. Executive Directive 2003-13 simply communicates internal policy and procedure regarding the operation of the Michigan Public Safety Communications System by the Director of the Michigan State Police "consistent with ... MCL 28.281 to 28.283." It does not purport to amend or have the effect of amending a law and, accordingly, does not violate Const 1963, art 3, § 2. [*Id.*]

Returning to your first question, you ask whether the DEQ may be directed to determine whether there are "feasible and prudent alternatives" to constructing a coal-fired power plant within the context of the air emissions permit process under Part 55 of the NREPA and, if there are, be directed to deny the permit. This question focuses primarily on paragraphs (A) and (D) of ED 2009-2. Before an answer is provided, it is helpful to review the applicable permit process.

A new coal-fired power plant qualifies as a "major stationary source"[4] of air pollutants subject to the permit requirements of the federal Clean Air Act, 42 USC 7401 et seq, Part 55 of the NREPA, and other associated federal and state rules. The federal Clean Air Act is comprehensive legislation, divided into various subchapters and parts that address air pollution prevention and control.

The DEQ implements certain parts of the Clean Air Act under a delegation of authority from the US Environmental Protection Agency (EPA). When the DEQ exercises delegated federal authority in this way, it acts on behalf of the EPA in implementing that part of the Clean Air Act in Michigan.[5] The DEQ may also administer an "approved state program" with respect to certain other parts of the Clean Air Act. An approved state program is one whose requirements as set forth in its applicable state laws and regulations have been reviewed by the EPA and determined to be sufficiently equivalent to federal law so that the State's program may be applied by the State in place of the federal law.

***5** Michigan's state program for permitting the construction of coal-fired power plants has been "conditionally approved" by the EPA.[6] The EPA has approved all the rules applied by the DEQ for permitting these facilities, Part 18 of Michigan's Air Pollution Control Rules, 2006 AACS, R 336.2801 et seq, with one exception not pertinent to the questions you have raised.[7] This office is advised that the DEQ is still acting as a delegated authority for purposes of permitting these facilities. But it is also applying the Part 18 rules that have been approved by the EPA as the equivalent of federal law.[8]

The approved Part 18 rules state, among other things, that a new major stationary source shall not be constructed without a permit requiring the source to apply best available control technology (BACT) for regulated air pollutants it has the potential to emit in significant amounts. 2006 AACS, R 336.2802(3) and 336.2810(2). BACT is defined as an emission limitation based on the maximum degree of reduction for each regulated air pollutant emitted from the proposed source in significant amounts "taking into account energy, environmental, and economic impacts and other costs." 2006 AACS, R 336.2801(f). Also relevant is Rule 1817 of Part 18, which states that the DEQ shall provide an opportunity for a public hearing so that interested persons may appear and submit comments "on the air quality impact of the major source, alternatives to it, the control technology required, and other appropriate considerations." 2006 AACS, R 336.2817(2)(e).[9]

As an administrative agency created by statute, the DEQ has no inherent powers and possesses only those powers that are expressly conferred by the state constitution or state statute or that are granted by necessary and fair implication to fully effectuate the express powers. *Pharmaceutical Research & Manufacturers of America v Dep't of Community Health*, 254 Mich App 397, 403-404; 657 NW2d 162 (2002). See also *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 503; 550 NW2d 515 (1996). A review of Part 55 of the NREPA and its corresponding rules reveals no provision either empowering the DEQ to make

a "determination" within the air emissions permit process that there are "feasible and prudent alternatives" to constructing a proposed coal-fired power plant, or requiring the DEQ to then deny a permit based on a determination that such alternatives exist. Moreover, since the Governor has no authority to amend substantive law by executive directive, the Governor lacks the power to require the DEQ to expand or otherwise alter the permitting process established by the Legislature in Part 55 or to remove an agency's discretion conferred by law.

Because they set forth additional legal authorities that underlie the Executive Directive, it is next appropriate to examine the recitals, that is, the prefatory "whereas" clauses of ED 2009-2, to determine whether any of the statutory provisions identified there provide a legal basis not found in Part 55 for imposing the directives set forth in ED 2009-2.[10]

***6** ED 2009-2 refers to Part 17 of the NREPA, MCL 324.1701-324.1706, the Michigan Environmental Protection Act (MEPA), and quotes section 1705(2), MCL 324.1705(2). The directive then observes that Part 17 "is supplemental to existing administrative and regulatory procedures provided by law." (ED 2009-2, Clause 7.)

But a plain reading of section 1705(2) does not provide the DEQ with the authority to make a determination of whether there are "feasible and prudent alternatives" to a proposed coal-fired power plant outside the context of a "proceeding" where particular conduct has been alleged and then determined to pollute, impair, or destroy, or to be likely to pollute, impair, or destroy, natural resources. Under section 1705(2), the evaluation of "feasible and prudent alternatives" does not arise until after the predicate allegation followed by a determination of "pollution, impairment, or destruction" of natural resources has been made. Section 1705(1) and (2) provide:
(1) 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.

(2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare. [MCL 324.1705(1) and (2); emphasis added.]

Moreover, the requirement that there be likely pollution, impairment, or destruction of natural resources before an evaluation of feasible and prudent alternatives is performed under section 1705(2) is supported by other provisions of the MEPA. For example, a plaintiff must make "a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources." MCL 324.1703(1). Thereafter, the defendant may "rebut the prima facie showing by the submission of evidence to the contrary," or the defendant may assert as an affirmative defense that there is "no feasible and prudent alternative to defendant's conduct." MCL 342.1703(1).

Thus, even assuming section 1705(2) applies to the air emissions permit process, as suggested by the reference in ED 2009-2, that section does not authorize the DEQ to determine whether there are "feasible and prudent alternatives" to a particular coal-fired power plant, until there has first been an allegation followed by an individualized determination that that plant will, or is likely to, pollute, impair, or destroy natural resources.

***7** Another prefatory clause in ED 2009-2 broadly asserts that coal-fired plants emit "thousands of tons of air emissions ... that threaten the air, water, and other natural resources of Michigan." (ED 2009-2, Clause 11.) It is reasonable to conclude that, recognizing MEPA's requirement as explained above, this statement was included in ED 2009-2 in an attempt to provide a blanket threshold determination that the construction of all new coal-fired power plants will pollute, impair, or destroy natural

resources, thus permitting or requiring the DEQ to consider feasible and prudent alternatives to all such proposed plants. But the provision of Part 17 relied on by the executive directive contemplates that such a determination will be made in the context of "administrative, licensing, or other proceedings" where "the alleged pollution, impairment, or destruction" is at issue. This clearly contemplates an individualized determination in a proceeding concerning specific conduct. The assertion stated in Clause 11 of ED 2009-2 does not constitute such a determination.

ED 2009-2 also cites section 165(a)(2) of the federal Clean Air Act, 42 USC 7475(a)(2), as providing the DEQ with "the discretion to consider alternatives to proposed sources of air emissions." (ED 2009-2, Clause 10.)[11] The DEQ's approved Part 18 rules contain a rule with language similar to section 165(a)(2).[12] Rule 1817 governs public participation in the permit process by providing an opportunity for interested persons to submit comments and be heard at a public hearing. After receiving a "technically complete" application, Rule 1817(2), R 336.2817(2), requires the DEQ to do a number of things, including:

(c) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed major source would be constructed, of the application, the preliminary determination [regarding the application], the degree of increment consumption that is expected from the major source or major modification, and of the opportunity for comment at a public hearing as well as written public comment.

* * *

(e) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the major source, alternatives to it, the control technology required, and other appropriate considerations. [R 336.2817(2)(c) and (e).]

By their terms,[13] Rule 1817(2)(c) and (e) require the DEQ to provide public notice and the opportunity for comment by interested persons on, among other things, "alternatives to [the power plant]." Rule 1817(2)(f) and (g) require the DEQ to:

(f) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing in making a final decision on the approvability of the application. The department shall make all comments available for public inspection in the same locations where the department made available preconstruction information relating to the proposed major source or major modification.

***8** (g) Make a final determination whether construction should be approved, approved with conditions, or disapproved.

Subsections (f) and (g) require the DEQ to consider the oral or written comments received at the public hearing, and make a final determination with respect to the application after doing so.

These four pertinent subsections require the DEQ to hold a public hearing at which interested persons may submit oral or written comments, which the DEQ must consider in making a final determination regarding the application. Rule 1817 provides no authority for a blanket mandate requiring the DEQ to determine whether there are more environmentally protective feasible and prudent alternatives to the construction of a proposed coal-fired plant, and, if there are, to deny the permit.

Finally, it is important to recall that ED 2009-2 states that section 165(a)(2) [42 USC 7475(a)(2)] provides the DEQ with "*the discretion* to consider alternatives to proposed sources of emissions." (Emphasis added.) It is acknowledged that the EPA's Environmental Appeals Board (EAB) - an administrative body that reviews certain EPA decisions - has interpreted section 165(a)(2) as authorizing the EPA, in its discretion, to also consider alternatives not identified in public comment, and to require that an applicant actually pursue alternatives the EPA deems viable or risk denial of a permit. See *In re Prairie State Generating Co*, PSD Appeal No. 05-05, slip op. at 38-40 (EAB, Aug. 24, 2006). Irrespective of whether that decision is supported by the language of section 165(a)(2) or not, the EAB's decisions are not binding beyond the parties to the appeal before it. Moreover, as the directive itself recognizes, the authority under section 165(a)(2) to analyze and impose alternatives is discretionary not

mandatory. As such, even assuming the EAB's interpretation of section 165(a)(2) were binding on the DEQ, the Governor cannot make mandatory, as ED 2009-2 does, that which the applicable law makes discretionary. OAG No 7157, p 138.

It is my opinion, therefore, in answer to your first question, that Executive Directive 2009-2(A) and (D), requiring the Michigan Department of Environmental Quality (DEQ) to determine whether there are more environmentally protective "feasible and prudent alternatives" to constructing a new coal-fired electricity generating plant when evaluating an air emissions permit application under Part 55 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.5501 et seq, and further requiring the DEQ to deny a permit if such alternatives exist, impose requirements that are not found in Part 55 of the NREPA or the other provisions of law cited in the directive. Therefore, Executive Directive 2009-2(A) and (D) attempt to amend substantive law contrary to the separation of powers doctrine of Const 1963, art 3, § 2, and are unenforceable.

Before addressing your second question - whether the DEQ may be directed to determine if there is a "reasonable need" for electricity generation in the State, the extent of that need, and, if there is such need, to consider "alternative methods" for meeting that need - further review of ED 2009-2 is required. Your second question primarily focuses on paragraphs (B) and (C) of the directive.

***9** Paragraphs (B) and (C) of ED 2009-2, which require the DEQ to engage in a "need and alternative methods" analysis, operate in relation to paragraphs (A) and (D), which require the "feasible and prudent alternatives" analysis described above. It is presumed that the directive intends the "need and alternative methods analysis" to operate in conjunction with the "feasible and prudent alternatives" analysis as a cohesive whole, such that a finding of the existence of a feasible and prudent alternative will provide a basis for a denial under paragraph (D). In other words, a logical reading of these operative provisions indicates that, if the DEQ were to make a determination under paragraph (B) that no "reasonable electricity generation need exists in this state that would be served by the proposed coal-fired electricity generating plant," the DEQ's "feasible and prudent alternative" determination under paragraph (A) would be that a "no-build" alternative would better protect the natural resources, thus requiring the permit to be denied under paragraph (D). Similarly, if the DEQ makes a determination under paragraph (B) that there is a "reasonable electricity generation need," and upon considering the "alternative methods" set forth in paragraph (C) regarding electricity generation,[14] thereafter finds one of those methods or some other method more favorable, the DEQ must determine for purposes of paragraph (A) that another "feasible and prudent alternative" to the coal-fired plant exists, and must, accordingly, refuse to issue a permit under paragraph (D). Under either circumstance, ED 2009-2 directs the DEQ to deny an air emissions permit to a proposed coal-fired power plant.

Because the "need and alternative methods analysis" can only logically be read as part of a cohesive whole that operates in conjunction with the "feasible and prudent alternatives analysis" required in the directive, the analysis already provided in response to your first question also answers this question.

First, to the extent the DEQ is being directed to undertake the "need and alternative methods analysis" under the broader umbrella of the "feasible and prudent alternatives analysis" the directive contemplates under section 1705(2) of the MEPA, the DEQ lacks the authority to engage in such an analysis. As explained earlier, section 1705(2) does not authorize the DEQ to proceed directly to determining whether there are "feasible and prudent alternatives" to construction of a coal-fired power plant, and deny a permit if there are more environmentally protective alternatives, without first determining, based on specific conduct "alleged" in a "proceeding," that the power plant will or is likely to "pollute, impair or destroy natural resources."

Second, the previous analysis of Part 55, its rules, and the other statutory provisions relied on in the directive, reveals no express or reasonably implied grant of statutory authority by the Legislature to the DEQ that would require the DEQ to make a determination regarding the need for electricity generation in this State, and alternative methods for meeting that need, within the context of deciding whether to grant or deny an air emissions permit.[15] Section 165(a)(2) of the Clean Air Act and R 336.2817(2) only expressly require the opportunity for and consideration of comment by interested persons. Nothing in those provisions can be read to require the DEQ to consider and make determinations regarding the specific alternatives listed in the directive.

***10** To the extent ED 2009-2(B) and (C) impose a sequence of specific factors that must be considered before the DEQ may issue an air emissions permit under Part 55, particularly where the application of the factors may form the basis for denying a permit, ED 2009-2 attempts to amend substantive law and, therefore, for the reasons explained above, violates the separation of powers doctrine in Const 1963, art 3, § 2.

It is my opinion, therefore, in answer to your second question, that Executive Directive 2009-2(B) and (C), requiring the Michigan Department of Environmental Quality (DEQ) to make an initial "determination" regarding the "reasonable electricity generation need" of a proposed coal-fired electricity plant and then further requiring the DEQ to consider alternative methods of meeting that need, attempt to impose requirements not found in Part 55 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.5501 et seq, or the other provisions of law cited in the directive. Therefore, Executive Directive 2009-2(B) and (C) attempt to amend substantive law contrary to the separation of powers doctrine of Const 1963, art 3, § 2, and are unenforceable.

Your final question asks what legal effect should be accorded to ED 2009-2 based upon the answers to your first three questions. Executive Directives cannot alter substantive law. See OAG No 7157, p 138.[16]

It is my opinion, therefore, in answer to your final question, that, although Executive Directive 2009-2 may constitute a formal expression of the Governor's environmental and energy policy preferences, it cannot and does not alter the existing regulatory requirements and procedures applicable to new coal-fired electricity generating plants under Part 55 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.5501 et seq.

Mike Cox
Attorney General

Footnotes

1 This opinion addresses only the legality of Executive Directive 2009-2. It does not address the desirability of the purposes sought to be achieved by the directive.

2 As explained below, air emissions permitting involves both state and federal law.

3 See also Hendrickson v Wilson, 374 F Supp 865, 876 (WD Mich, 1973), and http://www.michigan.gov/gov/0,1607,7-168-36898—-,00.html (accessed February 17, 2009).

4 See 40 CFR 52.21(b)(1)(i) and 2006 AACS, R 336.2801(cc).

5 Even under a delegation, the DEQ still implements applicable state law.

6 See, 73 Fed Reg 53366 (September 16, 2008). Once fully approved, the DEQ's program would implement Subchapter I, Part C of the Clean Air Act, "Prevention of Significant Deterioration of Air Quality," 42 USC 7470-7492.

7 The EPA required the DEQ to address deficiencies in R 336.2816, which address impacts to Class I areas (designated areas with higher air quality standards). 73 Fed Reg 53366 (September 16, 2008).

8 See http://www.michigan.gov/documents/deq/DEQ-AQD-toxics-CoalFired_ Power_Plants_info_242997_7.pdf (accessed February 19, 2009), and click on links for Permit Applications.

9 Presently, there are five proposed coal-fired power plants in Michigan involved in the permitting process. The DEQ's website contains "Fact Sheets" for two of the proposed coal-fired power plants (Wolverine Power Supply Cooperative, Inc and the Holland Board of Public Works). These provide an outline of the various permitting requirements and the permitting process. See http://www.deq.state.mi.us/aps/cwerp.shtml#WPSCU (accessed February 17, 2009), and click on the links for the Fact Sheet

10 ED 2009-2 cites Const 1963, art 4, §§ 51 and 52, which respectively declare the public health and general welfare of the people, and the conservation and development of the natural resources of this State, to be of primary or paramount public concern. Article 4 is the article relating to the legislative branch. Article 4, § 51 mandates that the Legislature shall pass suitable laws for the protection and promotion of the public health, and § 52 requires the Legislature to provide for the protection of the air, water, and other natural resources of the State from pollution, impairment, and destruction. These provisions are a mandate for legislative action and do not, by their terms, confer any independent authority on the Governor.

11 42 USC 7475(a)(2) provides:

(a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after the date of the enactment of this part [enacted Aug. 7, 1977], may be constructed in any area to which this part [42 USCS §§ 7470 et seq] applies unless—

* * *

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations.

12 42 USC 7475(a)(2), unlike Rule 1817, expressly provides for "representatives of the [agency director]" to submit comments and alternatives.

13 In construing administrative rules, courts apply rules of statutory construction. Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services, 431 Mich 172, 185; 428 NW2d 335 (1988). If the plain and ordinary meaning of the language used in the rule is clear, it must be enforced as written, and nothing may be read into the rule that is not present in the text as written. See Halloran v Bhan, 470 Mich 572, 576-578; 683 NW2d 129 (2004).

14 To the extent that ED 2009-2(C) does not limit the type or number of alternative methods that may be considered by the DEQ, that aspect is not important to the analysis presented in this opinion.

15 It is also worth noting that ED 2009-2(B) assigns certain duties to the DEQ that are presently assigned to the Michigan Public Service Commission. With respect to the requirement in paragraph (B) that the DEQ make a determination regarding the "reasonable electricity generation need" to be served by a proposed plant, the directive further states that "[t]he Michigan Public Service Commission shall provide technical assistance to the [DEQ] in making determinations required by this Directive." (ED 2009-2(E)). ED 2009-2 does not itself define "reasonable electricity generation need" or refer to any statute that either utilizes or defines the term. But the Legislature has established a statutory mechanism for utilities regulated by the Commission to seek a determination of the "need" for an electricity generating facility before construction under section 6s of the Michigan Public Service Commission Act, MCL 460.6s. That statute requires the Commission to consider need in the context of an application for a certificate of necessity under MCL 460.6s(3)(a) and (b).

16 Additionally, if, as a matter of the DEQ policy, ED 2009-2 were followed as written, and the air emissions permitting process under Part 55 were altered such that the DEQ, in every case, made a formal "determination" whether an energy need existed in this State that would be served by the proposed coal-fired plant and whether a feasible and prudent alternative to the proposed new construction existed where need was found, a further concern might be raised concerning whether this constituted "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency" thus falling within the definition of a "rule" that must be promulgated under the procedures set forth in the Michigan Administrative Procedures Act, MCL 24.201 et seq. See MCL 24.207 (definition of a "rule") and MCL 24.231-24.264 (describing the process for processing and publishing rules).

2009 Mich. OAG No. 7224 (Mich.A.G.), 2009 WL 739959

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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 2nd day of September, 2020, she served ***Enbridge Energy, Limited Partnership's Motion in Limine*** and this Certificate of Service in the above docket on the persons identified on the attached service list by electronic mail.

Angela R. Babbitt

Angela R. Babbitt

Digitally signed by Angela R. Babbitt
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