

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of
ENBRIDGE ENERGY, LIMITED PARTNERSHIP, Case No. U-20763
for authority to replace and relocate the
Segment of Line 5 crossing the Straits of Volume 2
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, R792.10447,
or the Grant of other Appropriate Relief.

_____ /

MOTION IN LIMINE

Proceedings held via Microsoft Teams in
the above-entitled matter before Dennis W. Mack,
Administrative Law Judge with MOAHR, for the Michigan
Public Service Commission, Lansing, Michigan, on
Wednesday, September 30, 2020, at 1:02 p.m.

APPEARANCES:

MICHAEL S. ASHTON, ESQ.
Fraser Trebilcock Davis & Dunlap, P.C.
124 West Allegan, Suite 1000
Lansing, Michigan 48933

On behalf of Enbridge Energy, Limited Partnership

CHRISTOPHER M. BZDOK, ESQ.
LYDIA BARBASH-RILEY, ESQ.
ABIGAIL HAWLEY, ESQ.
Olson Bzdok & Howard, PC
420 East Front Street
Traverse City, Michigan 49686

On behalf of Michigan Environmental Council (MEC)

(Continued)

1 APPEARANCES Continued:

2 JAMES M. OLSON, ESQ.
3 153 1/2 E. Front Street, Suite 203C
4 Traverse City, Michigan 40684

5 On behalf of For Love of Water (FLOW)

6 CHRISTOPHER M. BZDOK, ESQ.
7 Olson Bzdok & Howard, PC
8 420 East Front Street
9 Traverse City, Michigan 49686

10 -and-

11 MATTHEW L. CAMPBELL, ESQ.
12 DAVID L. GOVER, ESQ.
13 MARY ROCK, ESQ.
14 MEGAN CONDON, ESQ.
15 Native American Rights Fund
16 1500 Broadway
17 Boulder, Colorado 80302

18 -and-

19 CHRISTOPHER CLARK, ESQ.
20 DEBBIE CHIZEWER, ESQ.
21 Earthjustice
22 313 South Wacker Drive, Suite 1400
23 Chicago, Illinois 60606

24 On behalf of Bay Mills Indian Community (BMIC)

25 CHRISTOPHER M. BZDOK, ESQ.
26 LYDIA BARBASH-RILEY, ESQ.
27 WILLIAM RASTETTER, ESQ.
28 ABIGAIL HAWLEY, ESQ.
29 Olson Bzdok & Howard, PC
30 420 East Front Street
31 Traverse City, Michigan 49686

32 On behalf of Grand Traverse Band of Ottawa
33 and Chippewa Indians

34 CHRISTOPHER M. BZDOK, ESQ.
35 LYDIA BARBASH-RILEY, ESQ.
36 ABIGAIL HAWLEY, ESQ.
37 Olson Bzdok & Howard, PC
38 420 East Front Street
39 Traverse City, Michigan 49686

40 On behalf of Tip of the Mitt Watershed Council

41 (Continued)

Metro Court Reporters Inc. metrostate@sbcglobal.net

1 APPEARANCES Continued:

2 CHRISTOPHER M. BZDOK, ESQ.
3 LYDIA BARBASH-RILEY, ESQ.
4 ABIGAIL HAWLEY, ESQ.
5 Olson Bzdok & Howard, PC
6 420 East Front Street
7 Traverse City, Michigan 49686

8 On behalf of National Wildlife Federation

9 MARGRETHE KEARNEY, ESQ.
10 Environmental Law & Policy Center
11 1514 Wealthy Street SE, Suite 256
12 Grand Rapids, Michigan 49506

13 -and-

14 ESOSA AIMUFUA, ESQ.
15 35 East Wacker Drive, Suite 1600
16 Chicago, Illinois 60601

17 On behalf of Environmental Law & Policy Center
18 and Michigan Climate Action Network

19 JAMES A. BRANSKY, ESQ.
20 9393 Lake Leelanau Drive
21 Traverse City, Michigan 49684-7713

22 On behalf of Little Traverse Bay Bands of
23 Odawa Indians

24 AMY L. WESAW, ESQ.
25 1485 Mno-Bmadzewen Way
26 Fulton, Michigan 49052

27 On behalf of Nottawaseppi Huron Band of the
28 Potawatomi (NHBP)

29 DANIEL P. ETTINGER, ESQ.
30 MARGARET C. STALKER, ESQ.
31 Warner Norcross & Judd, LLP
32 1500 Warner Building
33 150 Ottawa Ave NW
34 Grand Rapids, Michigan 49503

35 On behalf of Michigan Propane Gas Association
36 and National Propane Gas Association

37 (Continued)

1 APPEARANCES Continued:

2 RAYMOND O. HOWD, Bureau Chief
3 LEAH J. BROOKS, AAG
4 State Government Bureau
5 P.O. Box 30758
6 Lansing, Michigan 48909
7 On behalf of the Mackinac Straits Corridor
8 Authority (MSCA)

9 ROBERT P. REICHEL,
10 Assistant Attorney General
11 Environment, Natural Resources and
12 Agriculture Division
13 P.O. Box 30755
14 Lansing, Michigan 48909
15 On behalf of Attorney General Dana Nessel

16 SPENCER A. SATTLER,
17 NICHOLAS Q. TAYLER,
18 BENJAMIN J. HOLWERDA,
19 Assistant Attorneys General
20 7109 West Saginaw Highway, Floor 3
21 Lansing, Michigan 48917

22 On behalf of Michigan Public Service
23 Commission Staff

24 - - -

25

1 Lansing, Michigan

2 Wednesday, September 30, 2020

3 1:02 p.m.

4 - - -

5 (Hearing resumed pursuant to the schedule.)

6 JUDGE MACK: Good afternoon. This is a
7 proceeding before the Michigan Public Service Commission
8 concerning the application filed by Enbridge Energy
9 Limited Partnership under Public Act 16 of 1929. This is
10 Case No. U-20763.

11 My name is Dennis Mack. I'm an
12 Administrative Law Judge with the Michigan Office of
13 Administrative Hearings and Rules. I have been assigned
14 to preside over this proceeding.

15 We will start the appearances.
16 Mr. Ashton, do you want to start off the appearances?
17 Mr. Ashton, you want to start off the appearances?
18 You're muted. Mr. Ashton? (Pause.)

19 MR. ASHTON: Can you hear me now, Judge?

20 JUDGE MACK: I can hear you.

21 MR. ASHTON: All right. Michael Ashton
22 on behalf of the Applicant, Enbridge Energy Limited
23 Partnership.

24 JUDGE MACK: Thank you, Mr. Ashton. Mr.
25 Sattler.

1 MR. SATTLER: Good afternoon, your Honor.
2 Spencer Sattler appearing on behalf of the Michigan
3 Public Service Commission Staff. I would also like to
4 enter the appearances of Benjamin Holwerda and Nicholas
5 Taylor on behalf of Staff.

6 JUDGE MACK: Thank you, Mr. Sattler. Mr.
7 Reichel.

8 MR. REICHEL: Good afternoon, Judge.
9 Robert Reichel appearing on behalf of Attorney General
10 Nessel.

11 JUDGE MACK: Thank you, Mr. Reichel.
12 Mr. Bzdok.

13 MR. BZDOK: Good afternoon, your Honor.
14 And I'm also doing a headset check. Can you hear me
15 O.K.?

16 JUDGE MACK: We can hear you.

17 MR. BZDOK: Great. This is Christopher
18 Bzdok appearing on behalf of the Michigan Environmental
19 Council, Grand Traverse Band of Ottawa and Chippewa
20 Indians as co-counsel, Bay Mills Indian Community as
21 co-counsel, Tip of the Mitt Watershed Council, and
22 Natural Wildlife Federation. Also entering appearances
23 at this hearing for Lydia Barbash Riley on behalf of
24 those groups, as well as Abigail Hawley on behalf of
25 those groups, and William Rastetter as co-counsel for
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 Grand Traverse Band. I will leave it to Mr. Clark for
2 the Earth Justice and NARF appearances on behalf of Bay
3 Mills. Thank you.

4 JUDGE MACK: O.K. Thank you, Mr. Bzdok.
5 Mr. Clark.

6 MR. CLARK: Thank you, your Honor. My
7 name is Christopher Clark with Earth Justice, entering my
8 appearance for the Bay Mills Indian Community. Also on
9 the line from Earth Justice are my colleagues Debbie
10 Chizewer and Mary Rock. With the Native American Rights
11 Fund, also representing Bay Mills, David Gover, Megan
12 Condon, and Matthew Campbell.

13 JUDGE MACK: Thank you, Mr. Clark. Mr.
14 Olson. (Pause.) Mr. Olson, you are muted.

15 MR. OLSON: Yes. James Olson, appearing
16 for FLOW, For Love of Water.

17 JUDGE MACK: Thank you, Mr. Olson.
18 Ms. Kearney.

19 MS. KEARNEY: Good afternoon, your Honor.
20 Margrethe Kearney on behalf of the Environmental Law &
21 Policy Center and the Michigan Climate Action Network.
22 Appearing with me today is Esosa Aimufua.

23 JUDGE MACK: Thank you, Ms. Kearney. Mr.
24 Bransky.

25 MR. BRANSKY: Good afternoon, your Honor.

1 James Bransky appearing for The Little Traverse Bay Bands
2 of Odawa Indians.

3 And as I indicated in my e-mail, our
4 legal arguments are aligned with those of the Bay Mills
5 Indian Community and Grand Traverse Band of Ottawa and
6 Chippewa Indians, so I do not intend to present any
7 separate argument today. And if for some reason a
8 technological glitch throws me out of the hearing room,
9 please don't wait on me.

10 JUDGE MACK: Thank you, Mr. Bransky. Ms.
11 Wesaw.

12 MS. WESAW: Thank you, your Honor. This
13 is Amy Wesaw appearing on behalf of Nottawaseppi Huron
14 Band of the Potawatomi. Similar to Attorney Bransky, I
15 will not be speaking on behalf of the Tribe today. I
16 don't have any argument as we also agree with Bay Mills
17 and Grand Traverse.

18 JUDGE MACK: Thank you. Anyone for the
19 Michigan Laborers District Council on the phone and
20 wanting to enter their appearance? (No response.)

21 O.K. Michigan Propane Gas Association
22 and National Propane Gas Association?

23 MS. STALKER: Good afternoon, your Honor.
24 Margaret Stalker, along with my colleague Dan Ettinger,
25 on behalf of the Michigan Propane Gas Association and
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 National Propane Gas Association.

2 JUDGE MACK: Thank you, Ms. Stalker. And
3 then finally, the Mackinac Straits Corridor Authority.

4 MR HOWD: Yes, your Honor. Raymond Howd
5 on behalf of the Straits Corridor Authority. And also
6 with me is Leah Brooks.

7 JUDGE MACK: Thank you.

8 MR HOWD: And we concur with the position
9 as taken by the PSC Staff, but will be available for any
10 questions that may arise.

11 JUDGE MACK: Thank you. I appreciate
12 that. Under the schedule established for this case,
13 Enbridge filed a motion *in limine* on September 2nd, and
14 on September 23rd responses were filed by jointly the
15 Michigan Environmental Council, Grand Traverse Band of
16 Ottawa and Chippewa Indians, Bay Mills Indian Community,
17 Tip of the Mitt Watershed Council and National Wildlife
18 Federation. Responses were also filed by Michigan
19 Propane Gas Association and National Propane Gas
20 Association, For the Love of Water, the Attorney General,
21 the Environmental Law & Policy Center and Michigan
22 Climate Action Network, and Commission Staff.

23 All of the parties were provided with a
24 link to this video conference, and I believe we have
25 everyone on who intended to participate.

1 So with that, I will turn it over to Mr.
2 Ashton. And Mr. Ashton, you may begin arguing your
3 motion.

4 MR. ASHTON: Thank you very much, your
5 Honor. At the outset I'd like to give a little overview
6 of our application, the history of it. The purpose of
7 Enbridge's application is to accomplish exactly what the
8 state is -- it's a legislative policy directive, excuse
9 me. And that is to relocate Line 5 Straits crossing
10 within a tunnel to provide greater environmental
11 protection to the Great Lakes.

12 As recognized in the second agreement
13 between the State of Michigan and Enbridge, which is
14 Exhibit A-10 to our application, this relocation "can
15 essentially eliminate the risks of adverse impacts that
16 may result from a potential leak from Line 5 at the
17 Straits."

18 Ironically now a small number of the
19 intervenors actually oppose this added protection for the
20 Great Lakes that was established both by executive and
21 legislative action. Throughout their position is rooted
22 in their continued long-standing opposition to Line 5.
23 For many, if not most of the opponents, doing so is part
24 of an anti-fossil fuel effort that has nothing to do with
25 the specific merits of the State's objective to protect

1 the Great Lakes or Enbridge's application before the
2 Commission. Their opposition to the enhanced safety for
3 the Great Lakes underscores that point.

4 As a result, Enbridge filed this motion
5 *in limine* to determine the appropriate scope of the
6 proceeding. In many respects Enbridge and Staff both
7 agreed to the proper statutory scope of the Commission's
8 jurisdiction. And these areas of agreement serve as the
9 crux for Enbridge's motion *in limine*.

10 In fact, Enbridge and Staff agree that
11 the demonstration of the public need for Line 5 is beyond
12 the scope of this proceeding. Enbridge and Staff agree
13 that the operational safety of Line 5 is beyond the scope
14 of this proceeding. Enbridge and Staff agree that the
15 environmental impacts of climate change are beyond the
16 scope of this proceeding. Enbridge and Staff even agree
17 that the Commission lacks jurisdiction to approve or deny
18 the construction of the tunnel. The Commission Staff's
19 own brief, at page 4, plainly states, "The Commission
20 cannot approve or deny the construction of the proposed
21 tunnel." Similarly at page 10 of the Staff's brief, they
22 recognize that a tunnel may be built without prior
23 Commission approval. Finally, Enbridge and Staff also
24 agree that the Commission's jurisdiction relates to the
25 siting of the pipeline within the tunnel.

1 However, we do disagree, and I will
2 discuss that later, as to the legal ramifications of the
3 siting authority. Nevertheless, at the outset it's
4 important to stress the substantial agreements between
5 the positions taken by Enbridge and the Staff as to the
6 proper scope of this case.

7 By way of background, this core policy
8 issue raised by Enbridge's application is whether
9 Enbridge should be allowed to place a new replacement
10 pipe segment within a tunnel under the Straits to provide
11 greater protection to the Great Lakes. Here the State of
12 Michigan has decided this policy question with an
13 unequivocal yes. The policy decision to relocate or
14 locate the replacement pipe segment within the
15 multi-purpose utility tunnel was a product of lengthy and
16 detailed review and study by both Michigan's Executive
17 and Legislative branches beginning in 2014. Among other
18 things, the extensive review included an independent
19 alternative analysis performed by Dynamic Risk, an
20 independent third party, which calculated that if the
21 pipeline was relocated within a tunnel, the risk for a
22 potential release into the Great Lakes would be
23 "negligible and unquantifiably low." And that was at
24 page 3-60 of their independent analysis.

25 Eventually the State's efforts culminated
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 in a bipartisan passage of Act 359. This Act supports
2 the construction of a multi-purpose utility tunnel for
3 accommodating not just Enbridge's pipeline but utility
4 infrastructure in general, including but not limited to
5 electric transmission line and facilities for the
6 transmission of data and telecommunications.

7 Act 359 also created the Corridor
8 Authority, stating that the carrying out of the
9 Authority's authorized purposes are for "public and
10 essential Government purposes" and granted the statutory
11 authority to acquire, construct, operate, maintain,
12 improve, repair, and manage a utility tunnel. So the
13 utility tunnel is multi-purpose and it's for a public and
14 essential government purpose, not just Enbridge. And
15 that's an important fact as we go through this argument.

16 Act 359 culminated into the tunnel
17 agreement, which is Exhibit A-5 to our application. The
18 tunnel agreement was authorized by Act 359, recommended
19 by the Governor, and entered into by the Corridor
20 Authority and led to the filing of this application.

21 By opposing Enbridge's application the
22 intervenors ignore this established State policy and seek
23 to accomplish administratively what they could not
24 accomplish earlier in the legislative and executive
25 branches regarding the location of the Straits crossing

1 within the State -- or within the tunnel, excuse me.

2 They now urge the Commission to second
3 guess the legislature's enactment of the law that
4 expressly authorizes the construction of the tunnel, and
5 the 2018 agreements entered into by the State concerning
6 the replacement pipe segment by raising issues clearly
7 outside the scope of Enbridge's application and the
8 Commission's jurisdiction.

9 Now let me turn to address some of the
10 specific arguments raised by the intervenors in their
11 responses to the motion *in limine*.

12 Staff and Enbridge agree that evidence
13 regarding the overall need for Line 5, future need for
14 Line 5 and potential alternatives to Line 5, are all
15 outside the scope of this proceeding because the
16 Commission and the Supreme Court have already
17 conclusively determined the need for and public purpose
18 of Line 5, and there is no basis in law to re-litigate
19 those already determined issues. In fact, the
20 intervenors now have conceded that this is not a
21 proceeding that could undo this earlier need
22 determination. This is located in the Michigan
23 Environmental Council's brief at page 32. But their
24 argument is that locating Line 5 in the tunnel will
25 somehow increase the longevity of Line 5, and therefore

1 the Commission must review the overall need for Line 5
2 and potential alternatives to Line 5 in this narrow
3 context. But the Staff in its brief stresses this
4 argument, that approval of the project will somehow
5 increase the longevity of Line 5 is pure speculation and
6 does not justify opening the door to this type of
7 evidence.

8 The argument also fails because in
9 reality the longevity of Line 5 will be determined by the
10 need for trans-- by the need for the transportation
11 services offered by Line 5, which is unrelated to the
12 existence of the tunnel or the Line 5's location within
13 that tunnel. This demand for transportation services is
14 and will be determined by the propane facilities and the
15 refineries served on Line 5, and ultimately determined by
16 the consumer demand for the fuels generated by those
17 facilities since the longevity of Line 5 will be
18 determined by consumer demand and not whether the Straits
19 crossing is within a tunnel or remains at its current
20 location.

21 Intervenors argue that the fact that
22 somehow Enbridge will receive a 99-year lease on the
23 tunnel and this somehow is evidence of increasing the
24 longevity of Line 5, but nothing is further from the
25 truth. The term of the lease does not change one iota

1 the fact that longevity of Line 5 will be determined by
2 the demand for Line 5's transportation services. When
3 that demand ceases, so will the use of Line 5. This is
4 no different under Enbridge's current 1953 easement
5 across the Straits, which is for an indeterminate
6 duration and arguably lasts forever. The terms of the
7 lease like the term for the 1953 easement has no impact
8 on the length and the operation of Line 5.

9 This argument also ignores the fact that
10 Enbridge currently has the legal right to maintain the
11 existing Line 5, including the current Straits crossing
12 as set forth in both the Commission's 1953 order and the
13 1953 easement. As it has done since 1953, Enbridge will
14 continue to maintain Line 5 as there -- as long as there
15 is demand for its transportation services, whether or not
16 the Straits crossing is located within the tunnel. Thus,
17 evidence as to the continued need for Line 5 is both
18 speculative, irrelevant, and this issue has been
19 previously and conclusively determined by the Commission
20 and should not be included in this case.

21 The next issue relates to the safety of
22 Line 5. As properly recognized by the Staff's brief, the
23 safety of Line 5 also is outside the scope of this
24 proceeding. As Enbridge has set forth in its motion, the
25 safety of Line 5 is exclusively regulated by PHMSA and
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 outside the jurisdiction of this Commission. No matter
2 the personal views of the intervenors regarding the
3 safety of other portions or aspects of Line 5, those
4 issues are exclusively federal and not to be resolved by
5 the Commission, and have no bearing on whether the
6 additional safety measures are implemented to protect the
7 Great Lakes.

8 The argument that the perceived safety of
9 other portions of the line -- of Line 5 should somehow
10 prevent the creation of additional environmental
11 protections to the Great Lakes is simply absurd and
12 illogical. It has no place in this proceeding. It's
13 irrelevant and outside the scope of the Commission's
14 jurisdiction.

15 The Staff brief also correctly concludes
16 that climate change is outside the scope of this
17 proceeding, and efforts to raise it in this proceeding
18 impermissibly sidesteps the legislature's authority to
19 craft energy policy for the State, and that's a direct
20 quote from the Staff's brief at page 17. As recognized
21 by the Staff, this authority rests with the legislature,
22 and such authority has not been vested in this Commission
23 in pipeline siting cases. This is the very reason the
24 intervenors are unable to cite a single case for where
25 the Commission considered greenhouse gas emissions in

1 determining the siting of a pipeline.

2 The briefs of the Environmental Law &
3 Policy Center and the Michigan Climate and Action Network
4 and even FLOW create a straw man, and their entire
5 argument is based on a false premise that Enbridge
6 disputes the existence of climate change, and therefore
7 is seeking to preclude greenhouse gases from this
8 proceeding for that reason.

9 However, the reason Enbridge opposes the
10 review of the impact of greenhouse gases in this
11 proceeding is based on the same reason as Staff, the
12 continuous use of fossil fuels is ultimately a
13 legislative decision and an economic decision driven by
14 the level of consumer demand. And this decision-making
15 authority has not, it has not been placed in the hands of
16 the Commission when deciding pipeline siting cases.

17 A number of the intervenors also site the
18 Buggs versus Public Service Commission case, the
19 January 13, 2015 decision. I call it Buggs 1 because
20 there was a subsequent decision in those cases on appeal
21 as well. But they cite this, this case, for the
22 proposition that MEPA requires the Commission to
23 undertake an expansive environmental review, including
24 climate change, as part of this contested case. And that
25 is a fundamental misreading of Buggs.

1 The Court in Buggs did not require an
2 extensive review, let alone a review of climate change to
3 satisfy MEPA. In fact, the Buggs Court concluded that
4 the Commission is not even required to "conduct an
5 independent investigation to satisfy MEPA." And given
6 the claims of the intervenors about the scope of MEPA,
7 this statement in Buggs is worth emphasizing. The Court
8 specifically stated that although MEPA "required a
9 determination that takes an environmental element into
10 account, Appellant -- meaning Buggs -- incorrectly
11 suggests that it is required that the Commission conduct
12 an independent investigation. There is no such language
13 in the statute to suggest that the Commission had any
14 such duty." So Buggs emphasizes that there is no duty
15 for the Commission to even conduct an independent
16 investigation, let alone some detailed investigation
17 about climate change or where the Commission has not been
18 granted any statutory authority.

19 JUDGE MACK: Mr. Ashton, but there is a
20 role for MEPA in this case, correct?

21 MR. ASHTON: Yes, there is, your Honor.
22 There is a role.

23 JUDGE MACK: What would Enbridge -- how
24 would Enbridge view that?

25 MR. ASHTON: So in Enbridge's view -- and
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 the MEPA statute, it's -- the relevant portion of that is
2 MCL 324.11705 sub part 2. And it talks about
3 administrative and licensing proceedings, and in those
4 types of proceedings you look at the, you look at the
5 conduct. And it says: Conduct shall not be authorized
6 or approved that has or is likely to have a harmful
7 impact on the environment.

8 Here you have to look at the words
9 "conduct shall not be authorized or approved". What
10 conduct is Enbridge asking the Commission to authorize or
11 approve? And that is the relocation of the replacement
12 pipe segment into the tunnel. Nothing else. We're not
13 asking -- The conduct here is not greenhouse gases. That
14 is conduct that happens downstream from Enbridge. That
15 is actions related to consumers burning fossil fuel.

16 It also is not related to the tunnel, the
17 construction of the tunnel, because as Staff's brief
18 recognizes, the Commission can neither approve nor deny
19 the construction of the tunnel. Therefore, under this
20 statute the conduct shall not be authorized or approved.
21 What conduct shall be authorized by the Commission? It's
22 just the location of the pipe, the replacement pipe
23 segment, within the tunnel. So that's the scope of the
24 MEPA review.

25 And the question then becomes for the

1 Commission, is asking this question: Is the environment
2 better off with the current Line 5 in its current
3 location, or is the environment better off with Line 5
4 being relocated within the tunnel? We think the answer
5 to that question is obvious, but the Commission is
6 entitled to explore that in this contested case
7 proceeding, and that is the issue before the Commission.

8 JUDGE MACK: Thank you.

9 MR. ASHTON: O.K. And just to finish up
10 with my, the Buggs case. I sent to you and the parties
11 earlier what I called the Buggs 2 decision, which is the
12 in re application of Encana Oil. And there the case was,
13 after Buggs 1 the case was remanded back to the
14 Commission. There the Commission refused to allow any
15 interventions, did not conduct a contested case hearing,
16 and then found that MEPA was satisfied. So that stresses
17 that MEPA does not require the extensive review required
18 or claimed to be required by the intervenors. The
19 Commission can easily meet the MEPA requirements. They
20 don't need to even grant interventions, they don't even
21 need to have a contested case, and they don't even need
22 to conduct an independent investigation. You just need
23 to look at the environmental impact of the conduct that
24 they're actually approving. And here, that's the scope
25 of MEPA in this case.

1 Before I move into the next issue
2 regarding our legal analysis as to the construction of
3 the tunnel, I wanted to briefly touch on the issue
4 relating to the consultation with the Tribes. And here I
5 think there are three important factors to keep in mind.

6 First is that the Commission has fully
7 complied with the requirements to consult with the Tribes
8 as established in the October 28, 2002 Government to
9 Government Accord, and the Executive Directive No.
10 2019-17 which are referenced by the intervenors. The
11 MPSC, the Commission, has met those requirements in that,
12 in those, in the Accord and the Directive.

13 Second, and this is critical, nothing in
14 the Accord or the Executive Directive expands or alters
15 the Commission's actual statutory authority set forth in
16 Act 16.

17 Third, and this is also important, the
18 Tribes, like all other parties, will continue to have an
19 opportunity to consult with the State and the Federal
20 government and shape the outcome regarding the tunnel
21 construction through numerous permitting activities that
22 remain before both EGLE and the United States Army Corps
23 of Engineers.

24 Now I'd like to --

25 JUDGE MACK: Mr. Ashton, I did have a

1 question on that. I think it was the Association's brief
2 that indicated there is a wetlands permit pending, an
3 NPDES permit pending? And did I see a Part 325 is
4 pending with EGLE?

5 MR. ASHTON: There is a Part 325, yes.

6 JUDGE MACK: Great Lakes submerged lands.

7 MR. ASHTON: Right. And it relates to
8 disturbance, potential disturbance to the submerged
9 lands. That is correct.

10 JUDGE MACK: O.K. And then of course you
11 have an application pending with the Corps. Is there any
12 sense of when there will be a decision on any of those
13 permits?

14 MR. ASHTON: My understanding is that
15 EGLE has announced that it intends to issue its decisions
16 in early to mid December. And the Corps is expected
17 sometime next year.

18 JUDGE MACK: And what if any effect would
19 that have with the Commission in their MEPA analysis? Is
20 it relevant whatsoever?

21 MR. ASHTON: You know, there is -- there
22 is potential relevance. I think, of course the
23 Commission could and should take judicial notice of those
24 decisions if it chose to do so. But I think that the
25 MEPA analysis for the Commission is also very narrow, or

1 narrow in focus on the replacement pipe being placed into
2 the tunnel, because that's the conduct before the
3 Commission. But if the Commission were to take some
4 expanded view of its MEPA obligations, then absolutely
5 they should take a review and acknowledge the work done,
6 work being done by EGLE and the Corps through the
7 environmental permitting process.

8 Now I know some of the intervenors have
9 argued: Well, Enbridge is talking out both sides of
10 their mouth. They're saying EGLE still has authority
11 under Act 359 to issue environmental permits, but somehow
12 the Commission doesn't have the authority to do its job.
13 Actually it's just the opposite, right. EGLE has their
14 authority to issue the permits. The Commission has its
15 authority to permit the location of the pipeline in the
16 tunnel. The Commission shouldn't jump into EGLE's
17 bailiwick, just like the EGLE shouldn't start telling or
18 permitting the location of the pipeline in the tunnel.
19 Each agency should stick to its own legislative
20 jurisdiction in reviewing the tunnel.

21 Now I know some intervenors complain
22 that that's not fair, but that is how the statutes have
23 been constructed by the Michigan legislature. And that's
24 the role of each administrative agency, given their
25 limited statutory authority.

1 JUDGE MACK: And would it be fair to say
2 that the issue before EGLE, and even the Corps, pertains
3 to the tunnel? It has no bearing on the pipeline?

4 MR. ASHTON: Yes, right. Well, EGLE and
5 the Corps are looking at the impacts, the environmental
6 impacts of the tunnel construction. EGLE is not -- it is
7 not Enbridge's position that EGLE could, EGLE could or
8 should decide whether the pipeline should be sited within
9 the tunnel. That's the decision for the Commission to
10 make.

11 JUDGE MACK: O.K. Thank you.

12 MR. ASHTON: And with respect to the
13 jurisdiction over the tunnel, the Michigan legislative by
14 plain and unambiguous language vested the Corridor
15 Authority the jurisdiction over the tunnel construction.
16 Section 14a(1) and Section 14d(1) of the Act 359
17 unequivocally granted the Corridor Authority the
18 statutory authority to acquire, construct, operate,
19 maintain, improve, repair and manage a utility tunnel.

20 Now, the intervenors ignore this plain
21 expression of intent, and the intervenors attempt to make
22 three arguments to assert the Commission has jurisdiction
23 over the tunnel. And all three fail.

24 But the first is that Section 14a(4) of
25 Act 359 intended for the Commission to somehow have joint
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 jurisdiction over the construction of the tunnel.

2 Second, they argue Section 3 of Act 16, which provides
3 the Commission with unlimited authority to control,
4 investigate, and regulate pipeline companies, somehow
5 says a pipeline company that is constructing the tunnel
6 grants the Commission regulatory authority over the
7 tunnel because of who is constructing the tunnel. And
8 third and finally, they argue that somehow the tunnel is
9 either a pipeline fixture under Act 16 or a facility
10 under Rule 47. And all of these arguments fail.

11 The joint jurisdiction argument, that Act
12 359 somehow provides joint jurisdiction over the tunnel,
13 is entirely misplaced. Here the Michigan Environmental
14 Council and others rely on section 14a(4) of Act 359
15 which states that the Corridor Authority must "secure the
16 approval of any department or agency", and then it goes
17 on to say, "required by law to approve the plans,
18 specifications, and location of the utility tunnel."
19 Thus the question is whether the Corridor Authority is
20 required by law to obtain the Michigan Public Service
21 Commission approval of the plans, specifications, or
22 location of the utility tunnel. And here the answer is
23 unequivocally no.

24 In fact Staff's own brief, at page 4,
25 acknowledges the Commission can not approve or deny

1 construction of the proposed tunnel. Likewise the
2 Propane Association's brief recognizes as a matter of law
3 that Act 359 would have allowed the Corridor Authority to
4 enter into an agreement for the construction of a tunnel
5 with an entity not even subject to Commission regulation.
6 Their hypothetical in their brief demonstrated that as a
7 matter of law the Commission approval is not required by
8 law, under Section 14a(4) of Act 359, because the tunnel
9 could be lawfully constructed without any Commission
10 approval.

11 The mere fact that the Corridor Authority
12 entered into an agreement with Enbridge to build the
13 tunnel also does not create a jurisdiction to approve or
14 deny construction of the tunnel because, as recognized by
15 the Commission Staff at page 10 of its brief, Enbridge
16 could have built the tunnel first before filing its
17 application with the Commission. Thus, the mere timing
18 of Enbridge's application did not create the requirement
19 by law under Section 14a(4) of Act 359 to obtain
20 Commission approval for the construction of the tunnel.
21 So the argument that somehow there is joint jurisdiction
22 under Act 359 failed any analysis of the language in that
23 section.

24 Next the intervenors argue that Section 3
25 of Act 16 gives the Commission jurisdiction. Section 3
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 of Act 16 provides, purports to provide the Commission
2 all limited "power to control, investigate, or regulate a
3 person exercising or claiming the right to carry or
4 transport crude or petroleum."

5 Any argument that this statutory
6 provision allows the Commission to regulate if and how
7 Enbridge constructs the tunnel is misplaced for the very
8 reasons cited in our brief at pages 7 through 9. First,
9 that statute relates to the carrying or transporting of
10 crude oil or petroleum and not the construction of a
11 multi-purpose utility tunnel pursuant to Act 359. So
12 it's inapplicable on its face.

13 Second, the unrestricted language in
14 Section 3 to control, investigate, and regulate the
15 pipeline company, as recognized by the Supreme Court
16 cases cited in our brief, constitute an unconstitutional
17 delegation of legislative authority to the Commission if
18 it were used to justify regulation over specific conduct.
19 This is the very reason the Supreme Court treats this
20 type of language as an outlying of jurisdiction which
21 grants no specific powers. The cases we cite in our
22 brief are the Huron Portland Cement Company and also the
23 Consumers case involving the first retail wheeling case
24 before the Michigan Supreme Court.

25 The expansive language in Section 3 of
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 Act 16 parallels the expansive language in Section 6 of
2 Article 3, which these court cases found would constitute
3 an institutional delegation of legislative power.

4 Section 6 of Act 3 specifically would
5 have provided -- states it provides the Commission with
6 "complete power and jurisdiction to regulate all public
7 utilities." This language parallels the language in
8 Section 3, and the Supreme Court has unequivocally
9 concluded that it can not be used to justify the specific
10 exercise of specific authority over utilities. Now, the
11 intervenors attempted to distinguish this case or these
12 cases cited by Enbridge because they say Section 3 of Act
13 16 is different because it does contain an expressed or a
14 specific grant of authority. But it doesn't.

15 While Section 3 of Act 16 contains a
16 specific reference to the type of utility, in Section 3
17 that's the pipeline company, it contains the same
18 unrestricted statutory language regarding the
19 Commission's authority that the Supreme Court has
20 recognized must be treated as broad, a broad outline of
21 jurisdiction. In essence the intervenors erroneously
22 suggest that the shortcoming found by the Supreme Court
23 with the language in Section 6 of Act 3 [sic] which
24 provides the Commission with complete power and
25 jurisdiction to regulation a public utility, could be

1 cured by simply re-writing the provision to read:
2 Complete power or jurisdiction to regulate all electric
3 utilities, or complete power and jurisdiction to regulate
4 all gas utilities. That's a fundamental misreading of
5 that case law, and it ignores the unconstitutional
6 delegation of legislative authority at the heart of these
7 Court decisions.

8 So in sum, we can't rely on Section 3 of
9 Article 16 because it has no guard rails. Unlimited
10 jurisdiction, if it be used to do anything and everything
11 to regulate a pipeline company, there is no limitations
12 whatsoever in that section. And it must be read as a
13 broad outline of authority, and you have to look through
14 the rest of Act 16 to find the specific power that the
15 Commission actually has.

16 And in this regard, that turns us to the
17 next argument that has been raised by the intervenors,
18 that the tunnel is somehow a fixture because the
19 Commission has jurisdiction under Section 1(2) over
20 pipeline fixtures, so the argument is somehow that a
21 tunnel is a pipeline fixture.

22 But the problem with that is that it
23 turns the definition of fixture on its head and ignores
24 the plain meaning of that term. As established in
25 Enbridge's motion, a fixture by definition is a piece of
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 moveable property that becomes affixed to something else
2 so that it becomes part and parcel of the thing its
3 affixed to. For example, the hardware store, a door or a
4 light fixture are movable goods but become fixtures when
5 affixed to a home. Similarly, a pipeline fixture would
6 be a valve or a protection device which are movable
7 pieces of personal property, but once they're affixed to
8 the pipeline, they become part and parcel of the pipeline
9 itself.

10 At the outset, unlike a light fixture or
11 a pipe valve, the tunnel is not a movable piece of
12 personal property and therefore it could not be a
13 fixture. That fact alone should be the end of it.

14 Nevertheless, the intervenors also argue
15 that the tunnel should somehow be treated as a fixture to
16 the pipeline because today only the replacement pipe
17 segment might be located in the tunnel. This argument is
18 equally misplaced. It's a factual matter. The
19 Telecommunications Association of Michigan has already
20 expressed an interest in the use of the tunnel by its
21 membership for broadband facilities. And I e-mailed to
22 you and the parties their letter to the Commission, which
23 is docket entry 231 in this case. So there is clearly
24 others interested in using the tunnel. And legally the
25 tunnel is a multi-purpose tunnel, and TAM and its members
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 are entitled to use it.

2 But even further, the absurdity of this
3 fixture argument is also exposed if and when others
4 exercise the legal right to locate within the tunnel.
5 Does the tunnel somehow then become a fixture to their
6 utility lines as well? Or do the utility lines, the new
7 utility lines, somehow become a fixture to the pipeline
8 because the tunnel has already been deemed, under their
9 argument, to be a fixture to the pipeline. And the
10 answer is: Of course not. Because the tunnel is not a
11 fixture and never became a fixture to the pipeline. It's
12 a separate stand-alone structure to house utility
13 facilities and does not become a fixture to those utility
14 lines.

15 And finally, the argument is that somehow
16 that -- Well, even if the tunnel isn't a fixture, it's a
17 facility, and therefore under Rule 447, the tunnel, you
18 know under Rule 447, which uses the word "facility",
19 somehow that captures the Commission's jurisdiction over
20 the tunnel. Again that argument fails.

21 First, an administrative agency cannot
22 expand its own jurisdiction by promulgating a rule. An
23 administrative agency may not under the guise of its
24 rule-making power abridge or enlarge its authority or
25 exceed the powers given to it by statute. There is two

1 cases that are on point, the Sterling Services Inc.
2 versus the Michigan Department of State Police, 20 Mich
3 App 502 at 514 that was published in 1969, and also a
4 Supreme Court decision, Ranke versus the Corporations
5 and Securities Commission. The cite for that case is 317
6 Mich 304 at 309, and that was published in 1947.

7 And that very principle, that very same
8 legal principle is actually baked into Rule 447 itself.
9 I e-mailed earlier to you and the other parties a copy of
10 Rule 447. In there it says that an entity -- Rule 447(1)
11 states that an entity listed in this sub rule shall file
12 an application with the Commission for necessary
13 authority to do the following -- and for pipeline
14 companies, that want to construct facilities, transport
15 crude oil or petroleum or crude oil and petroleum
16 products by common carrier for which approval is required
17 by statute. So the rule itself has the language for
18 which approval is required by statute. So Rule 447 on
19 its very face can not be used to expand the Commission's
20 authority that was granted to it by the legislature under
21 Act 16.

22 JUDGE MACK: Mr. Ashton, what would be a
23 facility then under that rule?

24 MR. ASHTON: Under that rule a facility
25 would be a pipeline itself, a fixture to a pipeline, but
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 not a tunnel. So the pipeline, like we said, a valve for
2 a pipeline, a pig launcher which is a device that inserts
3 a device into the tunnel to determine if there is
4 internal corrosion occurring. Those types of things
5 would all be part of the pipeline and would be
6 facilities.

7 But the reality is, Act 16 doesn't even
8 use the term "facility", it uses the term pipeline, it
9 uses the term equipment appurtenant to, and it uses the
10 term fixture. And those -- and the tunnel, which is
11 created under Act 359 for multiple utility use, is not
12 any of those things, and that's the key issue here. So
13 under the rule, Rule 447, what falls within the scope of
14 that rule would be the same things that fall within the
15 scope of Act 16.

16 JUDGE MACK: So a facility would be a
17 fixture as defined in Act 16?

18 MR. ASHTON: Right.

19 JUDGE MACK: No more, no less.

20 MR. ASHTON: No more, no less. And the
21 pipe itself it.

22 JUDGE MACK: The pipeline?

23 MR. ASHTON: The pipeline and the things,
24 you know, the pipeline fixtures that would attach to the
25 pipeline but not a stand-alone structure that, you know,

1 no. That's not going -- that doesn't meet the definition
2 of the multi-purpose utility tunnel, it doesn't meet that
3 definition of a fixture.

4 JUDGE MACK: O.K.

5 MR. ASHTON: Now at this point I'd like
6 to address the Staff's siting authority argument, and
7 it's important to address this argument because even
8 though the Commission, you know, if the Staff
9 recognizes -- let me step back.

10 The Staff recognizes in their argument
11 that the Commission does not have authority to approve or
12 deny the construction of this tunnel. And that's key.
13 And while it has authority to determine whether the
14 replacement pipe segment should be located within the
15 tunnel, that does not extend or expand its jurisdiction
16 over the tunnel itself. And the key case there would be
17 the Union Carbide case which we cited in our brief.

18 The issue in Union Carbide parallels this
19 case. There the Commission had ratemaking authority over
20 an electric utility, and it attempted to use that
21 ratemaking authority to decide when the utility could run
22 its plant, what order it could run its plants to meet
23 that utility's electric demand. The Court rejected that
24 position out of hand. It said: Commission, you have
25 ratemaking authority but that does not extend to other

1 decisions made by the utility, stating that the
2 Commission's authority would be conferred by clear and
3 unmistakable language, that doubtful power does not
4 exist.

5 And that is exactly true here. While the
6 Commission may ultimately decide whether the replacement
7 pipe segment may be located within the tunnel, that does
8 not create authority over the construction of the tunnel.
9 Here the scope of evidence should be limited to whether
10 the tunnel is a more suitable location for the Line 5
11 Straits crossing than its current location, and not
12 whether the tunnel should or should not be built or the
13 environmental impact of the tunnel construction.

14 Now I'd like to move to the --

15 JUDGE MACK: Before you do that,
16 Mr. Ashton, I just have a question on -- and I don't mean
17 to speak for Staff, and I assume Mr. Sattler will address
18 this, but Staff does make a distinction of the fact that
19 the tunnel has not been constructed, and that's
20 significant, and it is something that should be
21 considered in determining the safety of the pipeline. Do
22 you agree with that?

23 MR. ASHTON: So our agreement with Staff
24 is, the Staff has the right -- the Staff and the
25 Commission have the right to know, they have a right to
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 evidence and a right to know about whether the tunnel is
2 an acceptable location for the pipeline. So they can
3 ask, you know, they can ask and determine whether it's a
4 suitable location for the pipeline, can it be properly
5 maintained, is it -- can it act as an appropriate
6 containment measure compared to where the pipeline is
7 currently located. So those types of issues are clearly
8 within the scope of the case.

9 Whether or not the issue, the issue of
10 whether or not the design of the tunnel is an appropriate
11 location for the pipeline, that's an appropriate area of
12 inquiry for the Commission. And ultimately the
13 Commission has the ultimate decision as to whether or not
14 the pipeline is going to be located within the tunnel.

15 But that doesn't give the Commission
16 jurisdiction over whether or not the tunnel is built, and
17 it doesn't give jurisdiction to the Commission over the
18 environmental impact of that construction. So that's
19 where we see the distinction.

20 JUDGE MACK: O.K. Thank you.

21 MR. ASHTON: So as we set forth in our
22 motion, the Commission review under MEPA is determined by
23 Michigan statute, not any federal statute or other State
24 statute that might have been cited by other intervenors.
25 The statutory language in MEPA makes clear, as I

1 discussed earlier with you, it's limited to the actual
2 conduct subject to the agency's jurisdiction and review.
3 Again, the statute talks about conduct shall not be
4 authorized or approved, so you have to look at that
5 language to say: O.K. What conduct does the Commission
6 actually have the legal authority to authorize and
7 approve? And that is the relocation of the pipe into the
8 tunnel. So that is the MEPA review, the appropriate MEPA
9 review, for the Commission.

10 Staff wants to take it one step farther,
11 and this is where we have our disagreement with Staff.
12 While Staff acknowledges on page 4, the Commission can't
13 approve or deny the construction of the tunnel, the
14 attempt is to exert jurisdiction to review the
15 environmental impact of the tunnel by constructing or
16 asserting a but-for test. Staff's argument is but for
17 the relocation of the replacement pipe segment in the
18 tunnel, the tunnel would not be built, and therefore the
19 Commission should consider or has to consider the
20 environmental impact of the tunnel construction.

21 But this concept of a but-for test, it
22 may be rooted in the common law as part of tort analysis,
23 yet this Commission on the other hand has no common law
24 powers, and the Staff's but-for test is not rooted in the
25 statutory authority granted to the Commission by the

1 Michigan legislature.

2 Here the Commission's limited statutory
3 jurisdiction does not extend to the tunnel, and it may be
4 with out the Commission's authority. Thus logically, the
5 Commission's jurisdiction can't extend to the
6 construction's environmental impact. In other words, if
7 you don't have -- If you can't say yea or nay to the
8 construction of the tunnel, you don't really get a say
9 over the environmental impacts of that construction
10 because it's outside your jurisdiction.

11 Here, if the Commission were to exercise
12 authority beyond that allowed by statute, it would create
13 the two masters problem for Enbridge. What happens if
14 the Commission review results in requirements being
15 imposed by the Commission conflicting with those imposed
16 by EGLE, who actually has the environmental permitting
17 authority. The Commission's but-for test which is
18 borrowed from common law and is not based on statutory
19 language creates this problem by ignoring that the
20 Commission is an administrative agency with limited
21 statutory authority.

22 Further, as the Staff recognizes, and I
23 think this is where you referenced, Judge, at page 10 of
24 its brief, Enbridge could have constructed the tunnel
25 first and then filed an application with the MPSC to
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 relocate the replacement pipe segment in the tunnel. In
2 that instance there would be no Commission review of the
3 environmental impact of the construction for it would
4 already be completed.

5 This example also demonstrates that it is
6 the statutory jurisdiction granted to the Commission
7 which determines what conduct falls within its limited
8 MEPA review and not the Commission's but-for test
9 borrowed from common law.

10 And here I'd like just to re-emphasize
11 from the first Buggs case, Buggs 1, that the Court there
12 agreed with the Commission that the Commission's place is
13 not to enforce MEPA or other environmental law, but it
14 has a very limited overview consideration required by
15 MEPA, and that's required -- and that is to look at the
16 environmental impact of the requested regulatory relief
17 compared to the environmental impact of the alternative.

18 Now here, the regulated activities before
19 the Commission is only the location of the replacement of
20 the pipe segment in the tunnel. And the granting of that
21 relief will fulfill an important environmental objective
22 of the State of Michigan which is to alleviate
23 environmental risks to the Great Lakes. As quoted
24 earlier, the second agreement between Enbridge and the
25 State recognizes that this relocation "can essentially
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 eliminate the risk of adverse impacts that may result
2 from a potential release from Line 5 at the Straits."
3 The underlying goals of MEPA are clearly advanced by
4 granting Enbridge's requested relief.

5 Now in conclusion, the purpose of
6 Enbridge's application is to fill the State's policy
7 objective of relocating Line 5's Straits crossing within
8 a tunnel to provide permanent environmental protection
9 for the Great Lakes. The Michigan legislature and the
10 Governor firmly established this policy objective through
11 legislative and executive actions following years of
12 study and debate.

13 As set forth in Enbridge's motion *in*
14 *limine*, the purpose of this administrative proceeding is
15 not to continue or rehash the failed arguments of those
16 whose shut it all down views failed to carry the day in
17 the legislative and executive branch debates.

18 Here the Commission and Enbridge, the
19 Commission Staff and Enbridge agree wholeheartedly that
20 three subjects are well outside the scope of this
21 proceeding: The overall public need for a Line 5, the
22 overall safety of Line 5, and climate change. Staff and
23 Enbridge also agree that the Commission lacks authority
24 to approve or deny the construction of the tunnel.
25 Finally, Staff and Enbridge agree that the Commission has
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 authority to determine whether the Line 5 Straits
2 crossing may ultimately be sited within the tunnel. Yet
3 as explained in Enbridge's motion and argument here
4 today, that determination does not magically expand the
5 Commission's authority to the tunnel -- to the tunnel
6 construction's environmental impact for two important
7 reasons.

8 First, since the Commission's limited
9 jurisdiction does not extend to whether the tunnel may be
10 built, it logically it can not extend to the
11 construction's environmental impact. If an act is
12 outside the Commission's jurisdiction, so are any of the
13 impacts of that act.

14 Second, the agencies with permitting
15 authority over the tunnel, EGLE and the Army Corps, will
16 already be reviewing the environmental impact of the
17 tunnel. If the Commission takes up the same subject,
18 that review would not only be redundant and duplicative
19 but also beyond the Commission's jurisdiction.

20 That's all the argument we have today.
21 Thank you. And I'm happy to answer any questions that
22 you may have.

23 JUDGE MACK: I'm all set, Mr. Ashton.
24 Thank you for your argument. Let's take up the response
25 of the Michigan Propane Gas Association and the National
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 Propane Gas Association. Ms. Stalker.

2 MS. STALKER: Thank you, your Honor. The
3 Michigan Propane Gas Association and the National Propane
4 Gas Association support Enbridge's motion *in limine* as it
5 accurately establishes the proper scope of this
6 proceeding under applicable law.

7 As the Commission previously noted in its
8 June 30, 2020 order, the two activities triggering this
9 proceeding were Enbridge's plans for the replacement of
10 the existing 20-inch diameter dual pipelines with a new
11 30-inch diameter single pipeline and a relocation of the
12 pipeline through the lake bed through the tunnel.

13 So the question before the Commission on
14 Enbridge's application is whether Enbridge can do these
15 two things. Enbridge is not seeking the Commission's
16 approval to continue to operate Line 5 or to construct
17 the utility tunnel. The issues related to the operation
18 of Line 5, the construction of the tunnel including any
19 implicated environmental impacts, are outside the scope
20 of this proceeding.

21 The Commission possesses only the
22 authority granted to it by the legislature, and the
23 Commission's enabling statutes must be read narrowly and
24 in the context of the entire statutory proceeding. In
25 its June 30th order the Commission noted that under Act
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 16 it has the authority to review and approve both
2 pipelines and to place conditions on their operations.
3 Further, the Commission has the authority to make rules
4 and regulations and to give effect to -- to give effect
5 to and enforce the provisions of Act 16. One of those
6 rules is Rule 447 which requires an entity to file an
7 application under Act 16 for Commission approval to
8 construct facilities to transport crude oil or petroleum
9 or any crude oil or petroleum products to the common
10 carrier.

11 In this case the Commission found that
12 Enbridge is required to file an Act 16 application for
13 approval of a Line 5 project because it's a corporation
14 conducting oil pipeline operations pursuant to Act 16,
15 who seeks to construct the Line 5 project to transport
16 crude oil and petroleum products to the common carrier
17 for which approval is required by statute.

18 In reaching this decision the Commission
19 stated that Act 16 and Rule 447 focus on pipeline
20 construction. The Commission further found that case law
21 demonstrates there are two factors that generally
22 initiate the filing of a new application pursuant to Rule
23 447. These include a change in pipeline diameter and
24 relocation of the pipeline.

25 So the construction at issue here

1 involves the replacement of the 20-inch diameter dual
2 pipelines with a new 30-inch single pipeline and the
3 relocation of the pipeline through the lake beds to the
4 tunnel. Enbridge is not seeking and does not require
5 approval to continue to operate the existing dual
6 pipeline, and is not seeking approval to construct the
7 utility tunnel from the Commission. Rather, it is
8 seeking permission to do those activities from other
9 State and federal permitting agencies.

10 So the scope of this proceeding should
11 accordingly be limited to the requested action in
12 Enbridge's application, the new single pipeline and its
13 relocation. So matters related to the continued
14 operation of Line 5 and the construction of the utility
15 tunnel, including associated environmental impacts, are
16 outside the scope of the proceeding because they're not
17 implicated by Enbridge's application and they're beyond
18 the authority of the Commission under Act 16.

19 Specifically, issues related to the
20 continued operation of Line 5, including matters related
21 to the public need for Line 5 and the environmental
22 impacts of the continued operation, should be excluded.

23 As Mr. Ashton explained, the public need
24 for Line 5 has already been established, and because the
25 approval Enbridge is seeking now is to relocate a short

1 segment of Line 5 into a tunnel, the question of need in
2 this proceeding should be limited to the need to relocate
3 the pipeline to provide greater protection to the Great
4 Lakes, as Enbridge has described in its application.

5 Similarly, environmental matters related
6 to the continued operation of Line 5, including arguments
7 related to climate change, are beyond the scope of this
8 proceeding. Even if the Commission were to deny
9 Enbridge's application, Line 5 would continue to operate
10 at the current location. While approval of Enbridge's
11 application would result in relocation of the pipeline, a
12 denial would merely maintain the status quo, which is the
13 current operation of the dual pipeline. So because of
14 that, the continued operation of the pipeline, including
15 the public need for Line 5 and the environmental impact
16 of that continued operation, are just simply not at issue
17 in this proceeding.

18 Similarly, the construction of the
19 utility tunnel and related impacts are outside the scope
20 of the proceeding as well. As Mr. Ashton explained, the
21 Michigan legislature has already authorized the utility
22 tunnel and vested the Mackinac Straits Corridor Authority
23 with the authority to oversee the construction and
24 operation of the tunnel under Act 359.

25 While Act 359 doesn't strip the

1 Commission of the authority it may have, which includes
2 that the Commission, as stated in its June 30th order,
3 authority for pipeline construction under Act 16 and Rule
4 447, it doesn't grant the Commission any additional
5 authority over the construction of the utility tunnel.
6 Instead, under Act 359 the authority is expressly vested
7 in the Corridor Authority. The short segment of Line 5
8 that will be placed in the tunnel doesn't vest the
9 Commission with authority that it doesn't otherwise
10 already have over the tunnel, particularly where under
11 Michigan law the Commission's authority would be granted
12 by clear and unmistakable language, and nothing grants
13 the Commission the authority for the construction of the
14 utility tunnel.

15 Nothing in the Michigan Environmental
16 Policy Act requires the Commission to consider the
17 environmental impacts of the construction of the utility
18 tunnel. MEPA does provide for consideration of
19 environmental impacts and administrative and licensing in
20 this proceeding, but that consideration is limited to the
21 specific conduct before the agency. MEPA's focus is on
22 the conduct at issue and whether it has or is likely to
23 pollute or impair or destroy natural resources.

24 Here the conduct that is subject to the
25 Commission's consideration is the replacement of the
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 pipeline segment and its relocation, not the construction
2 of the utility tunnel. So any review of the
3 environmental impact of the Line 5 project by the
4 Commission should focus on Enbridge's proposed action,
5 which is the relocation of the pipeline and not the
6 construction of the utility tunnel. Limiting the scope
7 of the proceeding will allow the environmental impacts of
8 the construction of the utility tunnel to State review.
9 As Mr. Ashton explained, Enbridge is seeking permits for
10 tunnel construction from EGLE and the U.S. Army Corps of
11 Engineers. A review of those impacts will be undertaken
12 by those agencies.

13 So far EGLE and the Corps have solicited
14 public comments on the permit application and the
15 drafting of each permit, and EGLE has scheduled multiple
16 public hearings and public meetings. In addition to
17 participating in a public comment process, the parties
18 affected by a permitting decision may request a contested
19 case hearing under the Michigan Administrative Procedures
20 Act.

21 The environmental impacts related to the
22 construction of the tunnel are already being considered
23 by EGLE -- in connection with the EGLE and Army Corps
24 permitting processes, and limiting the scope of this
25 proceeding won't prevent challenges to those permits or

1 the participation in that process based on that.

2 In addition, EGLE and the Corps are well
3 positioned to analyze the environmental impacts of the
4 construction of the utility tunnel because they regularly
5 examine permit applications and issue permits under a
6 variety of statutes that are designed to protect natural
7 resources and the environment, including Michigan's
8 natural resources under the Environmental Protection Act
9 and the Clean Water Act.

10 It is common for a large project like
11 this, for multiple permits and multiple approvals from
12 various agencies are required, and not every agency is
13 required to review every part of the process.

14 Here the Commission wouldn't be shirking
15 its obligations by acknowledging that the analysis of the
16 environmental impacts of the construction of the tunnel
17 is being performed by co-agencies.

18 So in sum, issues such as the continued
19 operation of Line 5 and construction of the utility
20 tunnel are beyond the scope of the proceeding and should
21 be excluded, as consideration of those issues will result
22 in unnecessary delay on a decision on Enbridge's
23 application to complete a project that will benefit the
24 citizens of the State and provide greater protection to
25 the Great Lakes.

1 The Association accordingly supports
2 Enbridge's motion *in limine* and respectfully requests
3 that the motion be granted.

4 JUDGE MACK: Thank you, Ms. Stalker. I
5 appreciate your argument today. Next we will take the
6 argument of the Environmental Law & Policy Center and the
7 Michigan Climate Action Network. Ms. Kearney.

8 MS. KEARNEY: Thank you, your Honor. So
9 I just want to note that you have FLOW, I think, going
10 before, but I'm happy to --

11 JUDGE MACK: Well --

12 MS. KEARNEY: No, I'm happy to go first
13 if you'd like me to, but I don't want to throw Mr. Olson
14 off either.

15 JUDGE MACK: Well, since I called you and
16 I assume Mr. Olson is adaptable, why don't -- I'm sorry,
17 I did go off script. Why don't you go ahead, Ms.
18 Kearney, if you're ready.

19 MS. KEARNEY: Sure. Sure, certainly,
20 your Honor. So first I just want to take a second to
21 recognize and express kind of my gratitude and
22 graciousness for the professionalism that I see in these
23 proceedings and these contested cases. It is very much
24 appreciated.

25 But I do want to point out, you know,

1 this is a contested case whose purpose is to bring out
2 into the open all of the evidence relevant to the
3 Commission's decision. There's no jury in this case, and
4 while the Rules of Evidence apply, they're relaxed
5 because the decision-makers are understood to have the
6 competence and the sophistication to recognize where
7 evidence and argument might be prejudicial or not
8 credible.

9 The scope of Enbridge's proposed project
10 is enormous, a \$500 million tunnel under the Straits of
11 Mackinac, the replacement of over four miles of a
12 67-year-old pipeline, a pipeline that over the past year
13 has required installation of new supports to prevent it
14 from bending and weakening, a pipeline that has twice
15 been hit by anchors dragging along the lake bed, a
16 pipeline that is coming to the end of its useful life,
17 might be past the end of its useful life, a pipe that
18 Enbridge seeks to replace with a brand new segment of
19 pipeline housed in a tunnel with a 99-year lease.

20 The scope of the record in this case
21 should be commiserate with the magnitude of that project.
22 Contrary to Mr. Ashton's claim, this case is not about an
23 agenda or politics or a campaign against fossil fuels.
24 This case is about whether the full environmental impact
25 of the proposed project will be presented to the

1 Commission, or whether some subset of pollutants will be
2 carved out without any basis in law or in science.

3 Neither your Honor nor the Commission should be put in a
4 position of having to make that decision without all of
5 the facts.

6 But the broad scope of Enbridge's motion
7 *in limine* seeks to prevent that factual record from even
8 being developed. Mr. Ashton claimed earlier that MEPA
9 doesn't include greenhouse gases because there is no
10 Michigan case that includes an analysis of greenhouse
11 gases or climate change. But just because this is an
12 issue of first impression doesn't mean that greenhouse
13 gas emissions are excluded from MEPA. Enbridge asked
14 your Honor to read into MEPA language that isn't there, a
15 carve-out for greenhouse gases. This exception for
16 greenhouse gas emissions is not authorized by the
17 legislature. It is contrary to the plain language of the
18 statute which is grounded in the Constitution of the
19 State of Michigan, that an agency determine whether the
20 conduct it approves pollutes, impairs or destroys the
21 environment.

22 And there is a lot of talk about the
23 conduct that is at issue in this case. So what is the
24 conduct at issue? Enbridge would have your Honor believe
25 that the only conduct that is at issue is the act of
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 moving a pipeline from the lake bed to the inside of the
2 tunnel, and that that conduct, just moving that pipeline,
3 doesn't have any impact on greenhouse gas emissions, so
4 why make them part of this case at all?

5 But that isn't the conduct at issue in
6 this case. Enbridge isn't literally picking those
7 pipelines up off the lake bed and sliding them into a
8 tunnel. Enbridge is building a new pipe made of new
9 material and with a new life expectancy. The question of
10 how many new greenhouse gas emissions will result from
11 that conduct, just to relocate that pipeline, and how
12 those emissions will impact Michigan's environment, that
13 question has not been answered. And it can only be
14 answered through discovery, testimony, and briefing in
15 this case.

16 Enbridge wants your Honor to assume,
17 without the benefit of discovery or any expert analysis,
18 that this project will not increase the longevity of Line
19 5. Even if the pipeline can't be relocated, Enbridge
20 asks your Honor to believe and to assume as truth that
21 the relocation will have no impact on how long that line
22 runs.

23 Mr. Ashton argued earlier the demand for
24 Line 5 will be determined by demand for what's being
25 transported by the actions of people like you and me, not
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 the age of the pipeline itself. But that argument is
2 smoke and mirrors. If people would just stop breathing,
3 we would could stop evaluating particulate matter under
4 MEPA. Please stop drinking water, we wouldn't have to
5 address PFAs in this State at all. Those kinds of
6 unsupported assertions just underscore why the Commission
7 has to take into account an alternative framework for
8 understanding the environmental impact of this project.

9 Mr. Ashton and I actually agree on one
10 thing. He described the fundamental environmental
11 question as being whether the environment is better off
12 with the pipeline in its current location or better off
13 being moved. I agree, that's the question that's in
14 front of the Commission, but the Commission can not
15 evaluate that issue unless it considers the full
16 environmental impact of the relocation of the line. And
17 as Enbridge acknowledges, it's the Commission, not EGLE,
18 not the Army Corps, that has jurisdiction over the
19 relocation of the pipeline.

20 We cited a number of examples from the
21 federal government and from other states in our response,
22 showing that the analysis of greenhouse gas emissions for
23 projects like this is and can be done. When discussing
24 the prior administration's efforts to ensure that a
25 tunnel would be built, Mr. Ashton argued that intervenors
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 were ignoring State policy. But now it's Enbridge that's
2 ignoring State policy by seeking to exclude from this
3 proceeding any investigation into greenhouse gas
4 emissions.

5 Mr. Ashton references the recent
6 executive directive by Governor Whitmer, and notes that
7 it doesn't change anything about Act 16. But nothing in
8 the lame duck legislation Mr. Ashton cites in support of
9 his argument modifies or amends Act 16 either, yet
10 Enbridge relies heavily on that lame duck legislation in
11 supporting its arguments.

12 I'll tell you what the Governor's recent
13 actions do. They demonstrate that including greenhouse
14 gas emissions and their impact on climate change in
15 making decisions is a smart thing to do. It is something
16 that smart decision makers do because greenhouse gases
17 are pollutants that impact the environment. If we don't
18 understand and quantify the impact of our decisions, be
19 it particulate matter emissions, releases of PFAs into
20 the environment, or greenhouse gas emissions, we can't
21 expect the Commission to be able to do the job that the
22 legislature directed it to do under MEPA.

23 Greenhouse gas emissions are pollutants
24 that impact Michigan's environment. The magnitude of
25 that impact must be evaluated by the Commission under
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 MEPA, and failure to do so would be clear legal error.

2 Thank you, your Honor.

3 JUDGE MACK: Thank you, Ms. Kearney. I
4 appreciate it, and I'm sorry I called you out of order.
5 Why don't we take a break and come back on at 2:30. So
6 we're off the record.

7 (Brief recess taken from 2:15 to 2:32 p.m.)

8 - - -

9 JUDGE MACK: We are back on the record.
10 Next up is For Love of Water. Mr. Olson.

11 MR. OLSON: Thank you, your Honor. I
12 wanted to cover three areas. I intend to do the best I
13 can not to duplicate arguments that are being made today.
14 However, in some instances, particularly in the
15 discussion of MEPA by the last three presenters, there
16 are things I will need to address on MEPA that I hope
17 will answer some of the, some of your Honor's questions
18 that have been placed on the record so far.

19 The other thing I will do is look at
20 necessity but just in a couple of details. And then I
21 want to focus in on the relationship of the tunnel and
22 the tunnel pipeline as a public utility. There's plenty
23 of documentation that this is a utility tunnel as well as
24 the line.

25 So in order to do this, I'm going to in

1 reverse order and address the MEPA issue first. But
2 before I do that, I want to, for the record, state that
3 to the extent that I don't cover something on a necessity
4 issue under Act 16 and/or the authority of the
5 jurisdiction of you and the Commission, I want to make it
6 clear that we, you know, incorporate our brief on all the
7 issues that are being argued and on Act 16, particularly
8 the MEC et al. joint response brief. And in order to
9 avoid discussion on climate change, which we addressed in
10 our brief at pages 16 and 17, I will leave that to ELPC,
11 who has already argued.

12 Finally, I want to apologize to you and
13 the parties. In footnote 38 page 10 of our brief, I
14 cited a Commission case, No. U-17021, and I was
15 incorrect. It is U-17020, two zero that is, 17020. And
16 particularly, that case addressed issues involving the
17 replacement of Line 6b with the new Line 6b, and I bring
18 that case to your attention and others, which I will
19 address later, because many of the issues that Enbridge
20 is arguing here are belied by the Commission's manner in
21 which the jurisdiction and the scope and the standards
22 under Act 16 were handled in Line 6b. So we have a real
23 case analogy that occurred before the Commission
24 involving this company and their so-called attempt to
25 reduce the scope of this proceeding in a reductionist
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 fashion by trying to keep us in some world that this is
2 merely changing the plumbing from one part of the house
3 to the other. So let me start in.

4 MEPA fundamentally has three causes of
5 action. And when I say cause of action, I'm describing
6 the causes of action in 17031, which is the typical
7 circuit court case in which the plaintiff proves likely
8 conduct and if so, you get to the feasible and prudent
9 alternative issues. And the scope of those cases, of
10 course, is broad. There is no limitation under the
11 direct and punitive impacts that are related to the
12 conduct.

13 Secondly, as pointed out by Mr. Ashton,
14 there is a procedural cause and/or claim or duty, if you
15 will, explicitly imposed on the agencies under Section 17
16 (5)(2) that requires a consideration and a determination
17 of likely effects and feasible and prudent alternatives.
18 And clearly, both are in play. There's nothing in the
19 limitation of that other than MEPA cases arise under the
20 facts that are presented. So when you have a case that
21 might involve a driveway, not much threshold can be
22 approved. If you have a case that involves a road
23 through a wetland, you know, the likely impacts are
24 related to the road and anything that would be developed
25 and related to the road, the houses, the storm water

1 control, all of those facets that come into play in MEPA,
2 both under 17031 and 17052.

3 Now, there is another part of MEPA, and I
4 want to start with one of the first if not the first, it
5 was the second decision by the Michigan Supreme Court.
6 Actually it was the first because the Roberts case was
7 the Court of the Appeals. So this case was decided in
8 1974, and it's the Vanderkloot case, which the parties
9 have cited in their briefs. And the important part of
10 this case is found at pages 182 to 189. So when your
11 Honor gets a chance to go back and look at your notes and
12 the case law, this is of particular significance.

13 And I don't want to belabor the point
14 but, or to have to read something when we're in argument,
15 but it's very important. So I'm going to, with your
16 indulgence I'm going to do this.

17 The Supreme Court said that in addition
18 to the causes of actions, there are substantive duties
19 imposed upon agencies under MEPA as a direct result of
20 the fact that MEPA was passed as a legislative response,
21 in the Court's words, to the constitutional mandate under
22 Article 4 Section 52 that the State and its agencies and
23 private parties should conduct their affairs and consider
24 impacts and alternatives consistent with Article 452 to
25 prevent pollution impairment of our air, water, and

1 natural resources. So that's the framework for MEPA and
2 our discussion today.

3 And the Court said specifically, there
4 are procedural causes of action, and there are also
5 substantive rights, duties, and functions. In this case,
6 that is the Vanderkloot case, the Court said: We are
7 involved with substantive rights and the duties as they
8 apply to the Highway Condemnation Act in which the Road
9 Commission -- excuse me, the State Highway Commission,
10 engaged in a necessity determination required for the
11 highway project, not unlike what we're faced with today.
12 And the Supreme Court ruled that the necessity
13 determination in that case by the Highway Department, if
14 the Highway Department failed to adequately consider the
15 effects and alternatives related to the project that was
16 proposed, that the decision and necessity would be void,
17 reversed as an invalid exercise of discretion and
18 contrary to the duty imposed by MEPA. That's the law.

19 And our colleague Mr. Ashton here wants
20 to focus on 17052 when in fact, if this is a substantive
21 duty case imposed in agencies under Vanderkloot, so his
22 arguments are misplaced. So what does that mean?

23 The Court in those pages that I
24 mentioned, 182 to 185, but more up to 189, very
25 interesting. The Court said: Well, what does this mean?

1 What is the scope? What is the scope? And the Court
2 said the scope is similar to the National Environmental
3 Policy Act and environmental impact statement process,
4 and what Michigan had at the time, which was the
5 executive order of the Milliken administration which was
6 basically an executive order that imposed a mini national
7 environmental impact statement requirement on agencies.

8 The Supreme Court said the duty to
9 consider impacts and alternatives is imposed on an agency
10 as a result of MEPA directly. So when we get to
11 considering Act 16 (3) and whether there is unlawful
12 delegation of powers, so it doesn't even matter.

13 The agency here is considering a permit
14 of construction under Vanderkloot -- under which per
15 Vanderkloot is required to consider determining the
16 environmental effects. And the scope is given by
17 example.

18 Now again I emphasize that, for example,
19 when the Buggs court, Buggs case, was adopted by the
20 Court of Appeals, the Court of Appeals clearly rules that
21 MEPA applies to the Public Service Commission. But in
22 remanding, that situation was not a massive project like
23 this, a construction of a tunnel, a utility tunnel and
24 all of the fixtures and appurtenances as we have been
25 seeing, and the pipeline.

1 And the fact that the decision on the
2 tunnel is a commitment to the State of Michigan far
3 beyond existing Line 5, far beyond. So this is a major
4 project. The Buggs case was a gathering line or a -- not
5 a major distribution line. But you know oil wells have
6 gathering lines that then go to a collection line. This
7 is a collection line in which the company, the oil
8 company, needed to get Commission approval to get
9 condemnation powers, if they needed it, to get the
10 collection line to the distribution line. And it was a
11 small section of a state forest line in Kalkaska County
12 near Manistee County. So the facts dictate the scope.

13 You can't sever the scope from the facts
14 and you can't ignore the facts in this case. This is a
15 major if not the most major -- particularly when it comes
16 to the Great Lakes -- project in the history of Michigan,
17 considered by the MPSC, not that the other lines that it
18 considers are not important. So clearly Vanderkloot
19 applies and supplies to duty independent of all the
20 arguments raised by the movant.

21 The second thing that I want to point out
22 is the Ray versus Mason County case, which was the second
23 Michigan Supreme Court case under MEPA in '75, a year
24 later from Vanderkloot. And here the Court reiterated
25 that the MEPA's purpose is that historically agencies had

1 a rather myopic view of its narrow scope of statutory
2 authority and that MEPA was enacted to create a change
3 that allowed for a sizeable share of the initiative
4 program on enforcement by the agencies through the MEPA
5 process. And in this case, the Michigan Supreme Court,
6 which has been cited significantly, numerous, numerous
7 times, I don't need to mention it. The MEPA, "imposes a
8 duty on individuals and organizations, both in the
9 private and the public sector, to prevent or minimize
10 environmental degradation.

11 So we have a very clear legal duty under
12 Vanderkloot and MEPA imposed on this Commission in which
13 the goals of the Constitution and the MEPA, which was
14 exercised -- enacted pursuant to the self-executing
15 section of the statute -- supplies. So I want to now
16 turn to Act 16.

17 Act 16, in my view, coupled when the
18 statute is read as a whole, particularly with the rules,
19 447 particularly but also 448, clearly, clearly governs
20 crude oil pipelines, but it also supplies standards. And
21 there's two ways. One is, most significantly, that the
22 Commission has a series of opinions and orders that we
23 don't have to go into, including those involving Line 6b
24 with this company in 2012 and 2013, a series of orders
25 without objection by the company in those Kalamazoo

1 replacement line cases, that the standards were
2 necessity, reasonable alternative, and of course costs
3 and interest, the financial issues and safety, but also
4 in the public interest. And that, those agency
5 interpretations made of Act 16 and (3) and the whole act,
6 are interpretations which cannot be ignored. Courts have
7 to defer to these interpretations when the agency has
8 been given discretion and the exercise of that discretion
9 has created standards which apply. So we have MEPA and
10 we have necessity and we have the criteria under
11 necessity.

12 I want to point out now the tunnel and
13 the tunnel easement, I want to start with this. And I'll
14 start with Exhibit A-6 to Enbridge's application in this
15 matter. A-6 consists of two documents. One is the
16 easement in 2018 granted by the DNR to MSCA, the Corridor
17 Authority. And in that easement it is, at its heading
18 and throughout the language, described as a utility
19 tunnel with a pipeline to be located in the utility
20 tunnel. That's point one.

21 Exhibit A-6 also has the assignment of
22 easement from MSCA to Enbridge, in which the entire
23 easement and its language and the rights and limits and
24 conditions of the easement are assigned to Enbridge. And
25 again that easement involves the assignment of a utility
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 tunnel in which Enbridge can put its pipeline in this
2 tunnel.

3 And in addition, Act 359, as has been
4 pointed out by all the parties -- and I disagree with the
5 characterization of the full jurisdiction of MSCA and I
6 disagree with the characterization of Act 359 as somehow
7 being definitive of a narrow scope or reductionist view
8 of project as argued by Enbridge's counsel. What I find
9 is that Act 359, in its title at the bottom few lines of
10 the title of Act 359, that it calls authorizing the
11 operation of a utility tunnel, a utility tunnel. The
12 legislature didn't have in mind something apart from a
13 utility.

14 Secondly, the legislature was explicit
15 that the location and construction and operation and
16 permits, as we set forth in our brief and others have as
17 well, are subject to permits and approvals required by
18 law. And the easement says that and the assignment to
19 Enbridge says that.

20 The final point I'd like to make on this
21 point, on this Exhibit A-6, is that on its face the
22 easement that was assigned to Enbridge is authorized
23 under Section 2129 of Part 21 under MEPA. This replaced
24 the old Act 10 which was in existence when the 1953
25 easement was passed. And since '53 we had the '55 Part

1 325 Great Lakes Submerged Lands Act, which is either
2 supplemental or added new authorization requirements.
3 But Section 21.29, let's just focus on that. That states
4 that it authorizes the State of Michigan to grant public
5 utility easements over state land and public utility
6 easements in, under, through the bottom lands of
7 Michigan, including the Great Lakes, held in public
8 trust.

9 The point is, the statutory authority
10 itself under which the easement and the assignments were
11 made and granted are public utility easements. And it's
12 disingenuous for Enbridge to come here and claim that the
13 tunnel is not a public utility easement and therefore
14 somehow not subject to the jurisdiction of this
15 Commission.

16 Now I want to address next the
17 relationship of EGLE and what's been stated and
18 described, which I disagree with. I don't think it's
19 been accurately represented. And the duties and
20 responsibilities of this Commission. Because so far, in
21 my own involvement in this matter, including involvement
22 in reviewing and submitting comments before EGLE, under
23 the application for this tunnel, we have been able to
24 learn from public informational sessions, all of which
25 are recorded, on the NPDES permit and particularly what
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 was described today as Part 303, which is the wetlands,
2 which you asked about, your Honor, and Part 325 which is
3 the Great Lakes Submerged Lands Act. But an upland area
4 of wetlands will be significantly affected. And as to
5 the alternative analysis by EGLE, they have represented
6 that they are not going to do an independent alternative
7 analysis.

8 Secondly, as to Part 325 of the tunnel
9 construction, they have indicated that they're not going
10 to do an alternative analysis independently. And if it
11 is, it's going to be very slight and restricted. And the
12 problem with that is, there is nothing in MEPA that
13 allows a self-serving restriction on an application
14 before EGLE or an application before this Commission that
15 flows from the 2018 agreements signed by the Governor and
16 Enbridge, the former Governor. They created a
17 self-serving proposition that this was nevermore. It
18 says at the beginning it's nothing more than relocating
19 the segment in the Straits, one pipeline to another
20 covered by a 1953 decision, which is apples and oranges
21 from what we have with us today.

22 The fact is, as has been described by
23 many and I have already described, this is far, far
24 beyond, you know, changing the location of plumbing in
25 their house.

1 So it's my view that if EGLE, and they
2 have said this at the hearings, is deferring to the MPSC,
3 and Enbridge is over here arguing that the MPSC in your
4 proceeding, your Honor, should somehow be narrow and
5 relying on EGLE, we have a big breakdown. And it doesn't
6 make sense. This password of drawing lines from one
7 statute to another back and forth and relying on another
8 agency is a shell game. MEPA applies to EGLE equally to
9 how it applies to the MPSC, and there is no shell game
10 and there is no deferral. There is no language in any of
11 these cases that suggests that, including the Jenesco
12 case which was before the Court of Appeals which we cited
13 in our brief, and in any of the cases that have been
14 decided by the Court of Appeals on these issues.

15 So in conclusion, the tunnel is part and
16 parcel of the tunnel easement, the easement for the
17 pipeline. MEPA applies with its full sweep and scope,
18 and the failure of the Commission under the context of
19 this criteria as to the approval of the location and the
20 construction, et cetera, in this case, would lead it down
21 the road of its decision being void, and a huge waste of
22 time during the evidentiary proceedings, when in fact
23 this decision is absolutely controlling and this law is
24 controlling on the scope of the process. So it simply
25 doesn't make sense.

1 Finally I want to say, you know, just
2 reiterating the narrow view here. I mean look at the
3 pattern that we have been arguing about. First there was
4 a declaratory ruling to reduce this to a rubber stamp
5 proceeding, which the Commission rejected, our Public
6 Service Commission rejected on June 30th. I don't need
7 to repeat the language, but the direction was that this
8 cannot be decided without a full record. And they very
9 clearly intended the scope to be quite broad.

10 And I actually will point to -- and I
11 won't reiterate this, but if you go to our brief, we have
12 listed a significant number of findings by the Commission
13 on pages 4 and 5 of our brief. And I won't go into all
14 the cites, but it's basically from pages 58 to the end,
15 57 to the end of the opinion. There are findings that
16 are very clear that -- For example, the Line 5 project
17 differs significantly from what was approved in 1953.
18 The language of 447 does not distinguish between new
19 construction and a pipeline facility that is being
20 replaced. The Line 5 project is not maintenance and
21 equivalent replacement. These findings have already been
22 made in this case.

23 So I want to just end with one more
24 thing. This is something -- I'm quoting now only to give
25 you a bigger picture of what's transpired in the last
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 five years. In 2012 through 2014, Enbridge replaced Line
2 6b, in those proceedings, 17020 and others that we have
3 cited in various materials. And they replaced 6b, and
4 they chose the easement that was there rather than other
5 easements. Now they segmented the projects, 50 and 100
6 or 30 miles at a time, so they didn't have to look at the
7 whole, in terms of the entire route, so they avoided it.

8 But the fact is they doubled -- I want
9 you to understand this, your Honor. They doubled the
10 capacity of Line 6b, now called 78, from 400,000 barrels
11 a day to 800,000 barrels a day, the capacity of the
12 design. I say design because they haven't fully used
13 that. That's almost as much as what's in Line 5b today,
14 the 450,000 barrels or, excuse me, the 540 barrels a day.

15 But my point is, at the same time the
16 Commission looked at and approved equipment and injection
17 devices removed from stations around for Enbridge to
18 increase its capacity by playing around with pressure of
19 the existing Line 5 from 300,000 -- 180 to 300 thousand,
20 which is in this Commission's order in '53, in that
21 exhibit, A-3 I think it is, in this case. They, the
22 Commission looked at 180 to 300 thousand. It's now
23 540,000 barrels, 80 percent more. So you have 500 -- you
24 went from 300,000 to 540,000 barrels in the last five or
25 six years, and you doubled the capacity of Line 6b.

1 Enbridge's capacity went from 700,000 barrels in the
2 State of Michigan to over 1 thousand 300 thousand barrels
3 in the State of Michigan. And this has never received an
4 analysis, a consideration, and alternatives for the State
5 of Michigan in the last six years. And Enbridge has
6 painted the State into the corner, and the people of the
7 State and the agencies of the State into the corner. And
8 an applicant can't paint agencies into the corner to
9 escape or minimize or reduce the scope of the rule of law
10 in the State of Michigan under Act 16 and under MEPA.
11 Thank you, your Honor.

12 JUDGE MACK: Thank you, Mr. Olson. And
13 just so it's clear, you referenced MSCA a couple of
14 times, which I believe is the Mackinac Straits Corridor
15 Authority. Is that correct?

16 MR. OLSON: Did I?

17 JUDGE MACK: Yes, during your argument
18 you referenced --

19 MR. OLSON: Yes, MSCA. When I said MSCA,
20 M-S-C-A, I meant the Mackinac Straits Corridor Authority,
21 your Honor.

22 JUDGE MACK: Yes. I just wanted the
23 record clear on that. Thank you, Mr. Olson. I
24 appreciate it.

25 Next we have the joint respondents. And
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 Mr. Bzdok, were you going to start off?

2 MR. BZDOK: Yes, your Honor. Can you
3 hear me O.K.?

4 JUDGE MACK: I can hear you, so go ahead,
5 please.

6 MR. BZDOK: Thank you. So I know it's
7 going to be a long afternoon and maybe it's a long
8 afternoon already, but I do have a few things I want to
9 address. I'm not going to speak as long as I did at the
10 interventions hearing.

11 The topics I do want to discuss with you
12 are the question of whether the tunnel is within the
13 scope of the case, the public need for the project to
14 secure and extend the life of Line 5, and the
15 environmental risks resulting from the same.

16 My framing comment is simply that we
17 need to look at the overall sort of result of Enbridge's
18 position. Enbridge's position is that the tunnel is not
19 part of this case, that the public need for the tunnel
20 and the environmental risks from the tunnel are not part
21 of this case, that the public need for the project to
22 enable Line 5 to operate for decades to come is not part
23 of this case, that the environmental risks resulting from
24 a project that enables Line 5 to continue operating for
25 decades to come is not part of this case. And that ends

1 up leaving you literally with four miles of metal pipe
2 that will go down the tunnel. But then Enbridge says
3 that any determinations about those four miles of metal
4 pipe are preempted by the Pipeline Safety Act. So
5 literally we have a case about nothing left.

6 I would just echo Mr. Olson's comments,
7 he comes from a very good firm, that, you know, the
8 Commission has sort of spoken on that. The Commission
9 has said we, we're looking for comprehensive evidence. I
10 don't know what, if Enbridge's motion is granted, I don't
11 know what comprehensive evidence could possibly be
12 provided the Commission to meet the directives of the
13 June 30 order.

14 On the question now of whether the tunnel
15 is part of the case or within the scope of the case. I
16 would first point out that Enbridge leans very, very
17 heavily in its pleading on the role of the Corridor
18 Authority, and I'm looking at pages 5 and 6 of their
19 original motion in particular, and as well at the
20 comments they made in the declaratory ruling where they
21 say over and over again, under Act 325 Enbridge -- I'm
22 sorry, 359, Enbridge has or the Corridor Authority has
23 oversight over the tunnel, is in charge of the tunnel, is
24 in charge of the construction of the tunnel; the
25 Commission basically has no role because the Corridor

1 Authority's role over the tunnel -- because the Corridor
2 Authority's role over the tunnel is paramount.

3 But then I also note at the beginning of
4 the proceeding today that the Corridor Authority, who is
5 a party to this case, said that their position aligns
6 with Staff. And Staff's position is that the tunnel is
7 within the scope of this case. So I think Enbridge has a
8 problem there in that they lean very heavily on the
9 Corridor Authority's role keeping the tunnel out of the
10 scope of this case, but then the Corridor Authority
11 adopted Staff's position that this tunnel is part of the
12 scope of this case. So that's my first point on the
13 tunnel.

14 JUDGE MACK: Mr. Bzdok, I'm curious.
15 What about Staff's position that the Commission doesn't
16 have the authority to approve or disapprove the tunnel,
17 but merely consider the aspects of it in the context of
18 the pipeline. Would you agree with that?

19 MR. BZDOK: I do not agree with that.
20 The Commission has broad authority under Act 16, under
21 the authorities that we discussed in our brief. If the
22 tunnel is within the Commission's jurisdiction, the
23 tunnel is within the Commission's authority to approve it
24 or to disapprove it. The Commission also has an
25 obligation under MEPA here, and the Commission is

1 prohibited by MEPA from approving conduct that has the
2 likely effect of polluting, impairing, or destroying
3 natural resources.

4 So both under Act 16, the fact that the
5 Commission does have authority over the tunnel and
6 therefore has to make a decision on the tunnel, and also
7 under MEPA where the Commission is prohibited from
8 approving conduct that has the likely effect of
9 polluting, impairing, or destroying natural resources,
10 the Commission does have to make a decision on the
11 tunnel.

12 And I think the notion that the
13 Commission has to review whether the tunnel is actually
14 going to accomplish the purposes that Enbridge represents
15 for it, whether the tunnel is going to be routed and
16 designed and maintained safely, whether the tunnel has
17 addressed the risks that are claimed, whether the tunnel
18 has created other risks. The Commission can not duck
19 that or hide from that, nor would the Commission, I
20 believe. The Commission has the obligation to vet those
21 issues. And the Commission again has called for
22 comprehensive, a comprehensive record, testimony,
23 evidence, and discovery in this case. And so I think all
24 those issues the Commission intends to be on the table,
25 and I think that they are on the table under both of
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 these authorities.

2 JUDGE MACK: Thank you, Mr. Bzdok.

3 MR. BZDOK: Furthermore, and this is my
4 second point, is that this is a contested case under the
5 Administrative Procedures Act. Enbridge filed this case.
6 They were the, you know, like they say, a plaintiff is
7 the master of their complaint, right? Enbridge was the
8 master of their application in this proceeding. And they
9 filed extensive testimony and exhibits regarding the
10 tunnel. It's discussed in the testimony of all three of
11 their witnesses. It's discussed in Exhibits A-1, 4, 5,
12 6, 7, 9, 10, 11, and 12 of the Company's filing.

13 This is a motion *in limine*. It's a
14 motion to exclude other parties from submitting evidence.
15 It is also likely to be used to resist discovery. But
16 Enbridge has introduced all kinds of evidence into this
17 case about the tunnel. They have made all kinds of
18 allegations in their application about the tunnel.

19 We have a right under the APA and the
20 Commission's rules to do discovery on Enbridge's
21 evidence. We have a right to challenge Enbridge's
22 evidence and Enbridge's assertions about the tunnel.
23 That's how the process works.

24 We can't have a motion in lim -- we can't
25 put in a bunch of evidence about the tunnel and then file

1 a motion to exclude anybody else from putting in any
2 evidence to challenge the evidence that Enbridge has put
3 within this case about the tunnel. That doesn't comport
4 with due process, the APA, or the Commission rules.

5 Third, I want to talk just a little bit
6 about the statute. And there was a lot of discussion,
7 there's a lot of discussion in our brief about the
8 statute and about the role of sub section 3 and why that
9 is not the same thing as the role of sub section 1 from
10 the Public Utilities Act, and I'll refer to my arguments
11 in brief on that issue.

12 There was some argument today about, you
13 know, fixture. And your Honor had a question for counsel
14 for Enbridge about: Well, what would be a fixture? And
15 his first answer was, well, a pipeline would be a
16 fixture. But a pipeline is not a fixture to a pipeline.
17 And his second answer was, well, a valve that you would
18 put on a pipeline would be a fixture.

19 But the definition of a fixture, as we
20 briefed it in our pleading fairly extensively, is
21 something that's attached to the realty, the useful
22 adjunct to the realty, appurtenant. A valve on a
23 pipeline is not attached to the realty, is not a useful
24 adjunct to the realty, and it's not permanent. It's a
25 piece of equipment that goes on and off. It's not a

1 fixture. And Enbridge's definition of a fixture makes
2 the term fixture in Act 16 basically a nullity. It makes
3 it a meaningless term.

4 Furthermore, there is that language about
5 the Commission having authority over any other right
6 concerning the business or operation in whole or in part
7 of any entity in the business of transporting oil or
8 similar product. So even if we don't get it on fixture,
9 we certainly -- I have to do my Marco Rubio (drinking
10 water) -- get it on any other, on any other right
11 concerning the business or operations in whole or in part
12 of this entity which is regulated by the Commission.

13 Finally on the statute, the Commission,
14 as we talked about already, is delegated in Act 16 the
15 authority to issue rules. And the Commission as we
16 discussed before has Rule 447. And in Rule 447 the
17 Commission has used the term facilities.

18 And I believe you asked and Enbridge
19 counsel indicated that, well, a facility means the same
20 thing as a fixture. Well, if it meant the same thing,
21 the Commission could have just used the same word. I
22 interpret the term facility to be quite broad. We
23 provided definitions for it in our brief. It clearly
24 applies to large structures. It clearly applies to
25 things that house other things. And it's a very broad

1 term. And the Commission, the Commission's
2 interpretation of a statute it's charged with
3 implementing is entitled to respectful consideration.
4 And so we have got an interpretation by the Commission in
5 Rule 447 of their own statute.

6 Now Enbridge then says under Act 359 that
7 basically Act 359 settles the whole matter and that leads
8 to the query again of why have a case at all. But
9 furthermore, as we brief in some detail, 324(d)4(g) of
10 Act 359 requires Enbridge to obtain all required
11 governmental approvals, the agreement for the tunnel --
12 requires Enbridge to obtain all governmental approvals
13 and permits for the tunnel.

14 Enbridge's own alternatives report states
15 that the Commission would be one of the primary
16 regulators of the tunnel. That's Exhibit A-9 at page 3.
17 And it also is page 75 of the Exhibit A-9. There's a
18 table of -- may I share my screen, your Honor?

19 JUDGE MACK: Yes. Go ahead, please.

20 MR. BZDOK: (Sharing screen.) So
21 there -- Is that blinking for you?

22 JUDGE MACK: Yes.

23 MR. BZDOK: O.K. I won't leave it up
24 long. But the point there is, at page 76 there's a list
25 of construction and operation permits and approvals, the
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 tunnel is listed, and the Commission is listed down at
2 the bottom as being one of the entities that has
3 regulation over construction and operation of the tunnel.
4 And I'll stop sharing that because I can see that's not
5 great.

6 So that's a representation that Enbridge
7 made to the State of Michigan that, in the process of
8 getting all these permits and approvals that the
9 legislation called for, Act 359, and that the tunnel
10 agreements called for, that the Commission was going to
11 have an approval right over the construction and
12 operation of the tunnel. So that's maybe not a legal
13 opinion, but that sure was a representation made to the
14 State of Michigan during the process that Enbridge
15 counsel indicates that, you know, that we the naysayers
16 lost. But certainly they made representations about what
17 was going to happen in this case during that process.

18 Finally Enbridge argues in various ways
19 that the tunnel is independent of the Line 5 replacement
20 project because it's just a utility tunnel in general
21 that Line 5 will be moved into. We address that
22 contention with some discovery responses and some
23 exhibits in our briefing.

24 Today they raised this question of a
25 letter, a public comment letter. I'm not sure that a
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 public comment letter would constitute evidence for this
2 purpose, but there's a public comment letter from the
3 Telecommunications Association of Michigan. And they
4 say, well, see this shows evidence that we're not -- it's
5 not our tunnel. It's not a tunnel appurtenant to
6 Enbridge's facilities and equipment. But I would just
7 note that, I think the letter deserves a careful read.
8 The letter doesn't really say that anybody is
9 specifically in the process of seeking or really that
10 anybody seeks at all to put any broadband services in the
11 tunnel. It says that, you know, the State and Enbridge
12 will explore options for housing other facilities.

13 So I think it belies the idea that the
14 tunnel is not Enbridge's or primarily Enbridge's because
15 it talks about the State and Enbridge making some
16 determinations in the future. And the discovery and
17 exhibits that we submitted clearly indicate that no such
18 determinations have been made, and there are many design
19 questions that are open-ended and there are other
20 utilities who have gone on record saying they have no
21 interest in being in that tunnel. So really there is no
22 evidence to support Enbridge's position that this is sort
23 of a wide open utility corridor for a bunch of other
24 things and Line 5 is just one of many.

25 The public need for the project to

1 continue and extend the life of Line 5. I want to
2 respond here to Enbridge, and I also want to respond to
3 Staff. And again I'm going to try to share and see if it
4 works at all, and if not I want just want to point out a
5 few things that are in -- that's a little bit better
6 sight-wise, I think. (Sharing screen.)

7 So now I'm in Enbridge's application,
8 paragraph B. Line 5 provides needed energy
9 transportation. And then I go down to paragraph 14.
10 Line 5 transports these various products, it describes
11 the various products and where they're delivered and
12 where they're used and how they're used and why it's
13 important to use them.

14 And then you can go down to paragraph 24
15 of the application, which is on page 10, and here we
16 have, here we have statements that "The continued
17 operation of Line 5 through the State of Michigan serves
18 important public needs by providing substantial volumes
19 of propane to meet the needs of Michigan citizens,
20 supporting businesses in Michigan, and transporting
21 essential products, including Michigan-produced oil to
22 refineries and manufacturers."

23 And then we bump over to Mr. Marvin
24 Samuels testimony, which I see is flashing a little bit
25 worse and so I won't stay on it. But I'm on page 5 of
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 his testimony. And he says: Given the existing amount
2 of supplies and the continued expected demand, this
3 utilization of Line 5 is expected to continue into the
4 future well after completion of the project because there
5 is a lack of sufficient capacity on other pipelines to
6 serve these markets and transport these volumes and types
7 of light crude, light synthetics, and NGLs. That's after
8 providing substantial factual testimony about the subject
9 matter on which he concludes.

10 So Enbridge has included in their
11 application, has included in their testimony, has
12 included in their documents, numerous assertions that the
13 project is needed because there is and will be through
14 the future a continuing need for Line 5, for the
15 transport service provided by Line 5, and for -- and
16 because there is no other way, there is no other way to
17 meet those needs other than building the project and
18 running these materials through Line 5.

19 So just as with the tunnel, we have got
20 Enbridge taking positions in the case, making assertions
21 of fact, providing testimony and providing exhibits on a
22 disputed factual issue, and then we have got a motion *in*
23 *limine*, the effect of which would be to exclude any other
24 party from putting in evidence to challenge Enbridge's
25 evidence on the issue that Enbridge has asserted into

1 this case. And that does not comport with the APA, the
2 Commission's rules, or due process.

3 And again, this motion will be used as a
4 basis to resist discovery. So it would also prevent us
5 from doing discovery on those vital issues over which
6 Enbridge makes assertions in this case.

7 Now a brief response to Staff. So Staff
8 has taken the position that is at odds with our position
9 on this issue. With Staff I did appreciate that at pages
10 15 and 16 of their response on this issue they did at
11 least acknowledge that an argument could be made of the
12 type that we're arguing. They did indicate that, you
13 know, one could argue that the project opens the door for
14 the Commission -- sorry, that because the proposed
15 project could extend the life of Line 5, that could open
16 the door for the Commission to require a demonstration
17 again of need. (Coughing.)

18 JUDGE MACK: Let's go off the record.

19 (Brief pause.)

20 JUDGE MACK: We are back on the record.

21 Mr. Bzdok, you may proceed.

22 MR. BZDOK: O.K. So I appreciate the
23 Staff's recognition that there is an argument to be
24 considered there, although I disagree with their ultimate
25 conclusion. This is a \$500 million project, that

1 includes a grant of property rights for 99 years.
2 Whether you think the tunnel is part of this case or not,
3 it's undisputed that the purpose of the project that
4 Enbridge outlines in the application and the exhibits and
5 the testimony is to secure the continued operation of
6 Line 5 for decades to come by placing it in the tunnel.
7 There is no reason for Enbridge to do this otherwise.
8 There is no payback on the investment otherwise.

9 Enbridge asserts that without the
10 replacement project Line 5 will just stay in the water
11 perpetually. But again that's an assertion on a
12 contested factual issue. You can't make assertions on
13 contested factual issues and then prevent any other party
14 from weighing in on those issues by a motion *in limine*.

15 The pipes are pushing 70 years old. They
16 used to sit on the bottom of the Straits but they are
17 suspended in a water column now on anchor supports, some
18 of which are broken or missing. The Governor has ordered
19 the DNR to review the easement compliance and validity.
20 That's an exhibit to our pleadings. The same issues are
21 under review in the Ingham County Circuit Court.

22 These are live issues. They are open
23 issues. They're inappropriate for Enbridge to simply
24 say: This is always going to be here as long as there's
25 demand for it, and nobody else can put in any evidence on

1 that, and nobody else can do any discovery on that.

2 Furthermore, the position that, you know,
3 Line 5 will continue to exist, as Enbridge counsel says
4 today, so long as there is the demand for transportation
5 services for that line, that begs the question of how
6 long is that going to be? The need for the project that
7 Enbridge is asserting is a need to maintain a facility or
8 a pipeline to provide a service that Enbridge asserts is
9 needed, and Enbridge seeks to prevent any other party
10 from challenging whether it is needed by this motion *in*
11 *limine*.

12 Because the purpose of the project is to
13 secure the continued operation of Line 5 for decades to
14 come, the Commission must determine whether there's a
15 public need for that. With all due deference to Staff,
16 that determination is not outside of Act 16; it's a core
17 decision under one of the three Act 16 criteria that the
18 Commission implements.

19 Staff says, well, the issue is, are we
20 going to revisit the prior determination of need? And I
21 don't think that is the issue. We have been explicit
22 that that's not the issue. The issue is not revisiting a
23 determination of need for a pipeline 70 years ago, it's
24 determining whether there is a need for a new project to
25 extend the operational life of that pipeline for decades

1 to come. This is a new project that will extend the life
2 of the pipeline, and the world is quite different in 2020
3 than it was in 1953.

4 As to Staff's concern about whether it
5 was properly noticed that this would be under review, I'm
6 not sure what that concern is, to be candid. The June 30
7 order said the scope of this case was yet to be
8 determined by yourself. The propane associations are not
9 in this case because they're interested in the tunnel;
10 they're interested in this case because they're
11 interested in the role of the pipeline in providing
12 propane through its flow in areas that are far outside
13 the project area. So as far as people who may have had
14 an interest that's implicated by the pipeline outside of
15 the tunnel project area, you know those, they are aware
16 and they're in this case.

17 On the topic of environmental risk. It's
18 a similar argument that we have made in our brief because
19 the purpose of the project is to secure the continued
20 operation of Line 5 for decades to come. The Commission
21 has to determine what the environmental risks would be
22 that flow from that decision. And there are two points
23 on that.

24 Well, first of all, I mean I concur with
25 everything that Mr. Olson said about Vanderkloot, but I
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 also think it's fair to look at 17052, and that's the
2 provision that Mr. Ashton brought up and that Ms. Kearney
3 brought up, the one about the, in an administrative
4 licensing or other proceeding, alleged pollution,
5 impairment, or destruction of air, water, and natural
6 resources or the public trust shall be determined, and
7 conduct shall not be authorized or approved that has or
8 is likely to have such an effect if there are feasible
9 and prudent alternatives, et cetera.

10 We made this point in our brief, but I
11 think it's crucial. Conduct that is likely to have such
12 an effect. Likely to have such an effect is about the
13 broadest way the legislature could have written that
14 phrase. It is not limited to -- I mean, it draws a very
15 broad link, I guess I would say, between cause and
16 effect. If the conduct at issue here is a project which
17 will extend the life of Line 5 for decades to come, what
18 are the likely effects of that conduct is a very, very
19 broad question. Building the tunnel is the conduct,
20 locating the replacement pipeline is the conduct, you
21 know, in the tunnel. And doing these things enables the
22 line to operate for years to come. Therefore, the
23 pollution risks of continuing to operate the line for
24 years to come and decades to come because the project has
25 been approved, if it was approved, would be a likely

1 effect under 17052.

2 These are not hypothetical
3 considerations, right? This is a pipeline has that many,
4 many spill incidents. This is a pipeline that runs
5 through vast stretches of the State of Michigan,
6 including vast stretches where the Tribes who are parties
7 in this case have treaty reserved rights, and I defer on
8 that issue to Mr. Clark.

9 The second point on risks and on
10 environmental risks and on environmental issues is
11 basically the purpose of Enbridge's application.
12 Enbridge says that, well, it's concerns about the
13 operational safety of Line 5 and addressing the concerns
14 of spills that we are seeking to approve -- approval to
15 construct the tunnel to alleviate environmental concerns.

16 Section B on page 12 of the application
17 says, "Relocating the pipeline in the tunnel protects the
18 aquatic environment." Well, does it? That's the
19 question that's at hand. And that's a question that
20 Enbridge doesn't get to pick and choose the narrowest
21 possible pinhole with scope for that issue.

22 We have to look at does it really protect
23 the aquatic environment in light of, you know, Line 5
24 crosses 250 rivers and streams. The scope of the risks
25 and impacts that are reviewed is broad. We cited and
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 discussed in our brief pretty extensively the Wolverine
2 pipeline cases and especially the first one where you had
3 a pipeline that was replacing another pipeline, and there
4 was a very broad evaluation by Staff of what the issues
5 there would be.

6 It's a very, very similar type of a scope
7 to what we believe the appropriate scope of this case is.
8 What are all the impacts of doing this project? What are
9 all the likely effects of the conduct that's at issue
10 here? It was a very, very broad approach taken in
11 Wolverine. Wolverine withdrew that application but then
12 basically challenged the Commission's authority to
13 consider those issues.

14 And the Commission held very clearly that
15 it had deep authority and broad authority to consider all
16 of those issues and to make determinations about public
17 interests, about risk, about better options and better
18 alternatives, under Act 16. MEPA wasn't even really
19 discussed much in Wolverine 1, but there was a very, very
20 broad scope looked at for these issues under Act 16.

21 So if the purpose of the project is
22 basically to eliminate a risk for the aquatic
23 environment, the parties have a right to challenge
24 whether the project will actually do that, or whether the
25 project will prolong risks to the aquatic environment,

1 will extend risks to the aquatic environment.

2 You know, this project is going to take
3 years to develop. So that's an additional risk to the
4 aquatic environment. And all of that I think is on the
5 table.

6 Finally, Enbridge mentioned preemption,
7 and we rest on our brief for that.

8 Oh, I do want to just mention briefly
9 about this argument about Buggs, which would be, I guess,
10 the last thing that I would have to say.

11 So Enbridge in the argument about Buggs,
12 the Buggs cases, Enbridge continues to conflate the
13 conduct that's under review with the evidence that the
14 Commission can consider. Well, the very important thing
15 about Buggs was, the proposed intervenors who wanted to
16 put environmental evidence in or were challenging that
17 decision, they were denied intervention in those cases.
18 And so they were not able to put in evidence in those
19 cases. And the Commission did a review based on evidence
20 that the Commission chose to look at, and the -- I guess
21 I'll call them the punitive intervenors or the
22 challengers, they challenged whether that was sufficient
23 for MEPA. But -- and the Court of Appeals said no, it
24 wasn't. And they were denied intervention, and they did
25 not appeal the denial of intervention.

1 Here we're not asking, talking about what
2 should the Commission consider basically of its own
3 devices, we're arguing about whether the parties have a
4 right, who have been granted intervention, who are full
5 parties to this case, to put in evidence on those issues.
6 Enbridge says: They can't put in any evidence on those
7 issues. We're saying that we can, and Buggs is really
8 apples and oranges on that point.

9 So that's all I have for you.

10 JUDGE MACK: Thank you, Mr. Bzdok.

11 Mr. Clark.

12 MR. CLARK: Good afternoon, your Honor.

13 Can you hear me O.K.?

14 JUDGE MACK: I can hear you. You may
15 want to speak up just a little bit or turn up your
16 volume.

17 MR. CLARK: O.K. I'll try to keep my
18 voice higher.

19 I want to thank you for giving me the
20 opportunity to speak today. It's very much appreciated.
21 And I also want to thank my colleague and friend, Mr.
22 Bzdok, for so ably presenting our position in this
23 matter. I did want to have a moment to speak with you
24 about some particular issues that are of importance to my
25 client, Bay Mills.

1 I would like to start by discussing
2 briefly Bay Mills' interests that are at stake here in
3 this proceeding, because I think an understanding of
4 those interests provides some important context for
5 understanding the impact of Enbridge's motion *in limine*
6 and the impact specifically that it has on Bay Mills'
7 ability to protect those interests here.

8 As I think we stated in every pleading
9 that we've filed, Bay Mills is a signatory to the 1836
10 Treaty of Washington, and the signatories to that treaty
11 ceded almost 14 million acres of land to the United
12 States for the creation of the State of Michigan. And
13 I'll refer you back to our petition to intervene in which
14 we included a map that details that ceded territory.

15 And also in that Treaty the Tribal
16 functions, including Bay Mills, reserved the right to
17 fish, hunt, and gather in the ceded territory. But you
18 know, the fishing, hunting, and gathering doesn't even
19 come close to capturing the significance of the territory
20 and the Straits and the Great Lakes to Bay Mills. The
21 Great Lakes and the Straits of Mackinac have profound
22 cultural and spiritual significance to Bay Mills. The
23 Straits and the surrounding area, they are central to Bay
24 Mills' creation story, and according to the tribe's oral
25 histories, the land, fish, animals, fauna, life itself

1 was created in this region.

2 And the right to fish, of course, is of
3 particular importance to Bay Mills. Commercial and
4 subsistence fishing continues to be the primary
5 occupation of members of Bay Mills. In fact, over one
6 half of its members rely on fishing for all or a portion
7 of their annual income. And of course the need for a
8 healthy aquatic environment in which fish can thrive is
9 critical. The spawning grounds of the fish are in the
10 Straits and the nearby waters.

11 And again referring back to our petition
12 to intervene, we submitted the affidavit of Jacques
13 LeBlanc Jr., and he is but one example of a member of the
14 community for whom fishing is critical. And he described
15 in that affidavit in quite stark terms what an oil
16 catastrophe will do to his livelihood. And he said, "If
17 the Great Lakes are harmed, there will be to no more fish
18 in the water and no means to continue supporting my
19 family through fishing."

20 And also in our petition to intervene,
21 President Newland of the Tribe said that the risks
22 associated with Line 5 are the most obvious and
23 preventable risks to the treaty protected resources of
24 Bay Mills.

25 So I provide that background to just
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 touch on a few aspects of the pending motion that touch
2 upon the interests that are at stake here for Bay Mills.

3 We adopt and agree with the arguments
4 previously made by Mr. Bzdok, Mr. Olson, and presented in
5 our brief about why evidence about the construction of
6 the tunnel and the environmental impacts of the tunnel
7 must not be excluded. But we simply would like to add
8 that the construction itself is of deep concern to Bay
9 Mills. We would like the right to offer evidence
10 regarding the potential impact of the tunnel on Bay
11 Mills' treaty protected rights and specifically the
12 impact on the fish and spawning grounds in the regions,
13 on the wetlands and species in the region, and on
14 resources in the area that have particular cultural,
15 spiritual, and religious significance.

16 I also want to touch briefly on the
17 argument that the determination that was made in 1953
18 about public need somehow prevents consideration of
19 concerns about the entire pipeline. Concerns about the
20 risks and effects associated with the continued operation
21 of Line 5 relate to and are relevant to the impact that
22 approval of this application would have on Bay Mills'
23 legal treaty protected interests. The tribal interests
24 at stake here extend well beyond the immediate vicinity
25 of the tunnel, and the Tribe's legal protected interests

1 are antecedent and superior to any rights that Enbridge
2 may have arising from a 1953 decision of the Commission.
3 There is no indication that Bay Mills's interests were
4 ever considered in 1953, but they must be considered
5 today. And no MEPA analysis was conducted in 1953, and
6 one certainly needs to be conducted today. Bay Mills'
7 interests and concerns relate directly to the
8 environmental impacts that must be considered under MEPA.

9 Indeed I would submit that focusing on
10 the 1953 public need determination is a bit of a red
11 herring here. We're here on a new application. And as
12 the Commission noted in its June 30th order, the public
13 need for this new project must be assessed. Whether
14 there is a public need for the new pipeline segment
15 hinges on whether there is a public need for the lifetime
16 of Line 5 to be extended for years to come.

17 Finally I want to touch upon what
18 Enbridge's motion *in limine* means for Bay Mills' right to
19 consultation and to participate as an intervening party
20 in this matter. As we stated in our brief, the 2002
21 Government to Government Accord between the State of
22 Michigan and the federally recognized tribes, and the
23 2019 executive directive from Governor Whitmer, require
24 consultation between the State and Bay Mills when actions
25 or proposed actions may significantly affect Bay Mills'

1 interests. And this obligation applies to all State
2 agencies pursuant to the executive directive, including
3 the MPSC.

4 Now the goal of consultation, as stated
5 in the executive directive, is to have meaningful
6 conversation and collaboration between the State and the
7 Tribes, and to provide a process by which the Tribes can
8 raise their concerns about perspective agency action and
9 provide meaningful input into the decision making
10 process. And Bay Mills has requested that consultation,
11 and consultation has begun.

12 The motion *in limine* that is before you,
13 your Honor, would impair that meaningful consultation.
14 In fact, consultation would be far less effective here if
15 the most important issues that Bay Mills wants to raise
16 about the possible approval of this project are basically
17 cut off from consideration by the Commission through this
18 motion *in limine*.

19 Furthermore, Bay Mills has intervened as
20 a party in this case. In fact, the last time we were
21 here you granted our petition to intervene, and you ruled
22 that we, that Bay Mills has a legal right to intervene,
23 to be here. And that is because we have legal interests
24 that are potentially at stake, and we are entitled to
25 intervene as a party to protect those interests.

1 If Bay Mills has a legal right to
2 intervene to protect its legal treaty protected
3 interests, then we must be permitted to present evidence
4 and testimony about these interests and the ways in which
5 the project threatens to impair them. Otherwise we won't
6 be able to, as an intervening party, adequately protect
7 our treaty protected interests.

8 Thank you, your Honor, for the
9 opportunity. And as stated, we support the arguments
10 made by Mr. Bzdok, Mr. Olson, and by our colleague at the
11 ELPC.

12 JUDGE MACK: Thank you, Mr. Clark. I
13 appreciate it. Let's take a break till 3:45, and then we
14 will hear Staff's argument.

15 (Off the record from 3:37 to 3:47 p.m.)

16 - - -

17 JUDGE MACK: Back on the record. Before
18 we went off the record, I misspoke. Before we get to Mr.
19 Sattler we have Mr. Reichel. Mr. Reichel, do you have
20 any argument to make?

21 MR. REICHEL: Just for --

22 JUDGE MACK: Hold on. Let's go off the
23 record.

24 (Brief pause.)

25 JUDGE MACK: Let's go back on the record.

1 Mr. Reichel, you may proceed.

2 MR. REICHEL: Thank you, Judge Mack.
3 Very briefly. First I would note for the record, as
4 you're already aware, that the Attorney General in
5 response to Enbridge's motion *in limine* filed a short
6 response adopting and incorporating by reference the
7 arguments advanced in the responses filed by Michigan
8 Environmental Council et al., and the Environmental Law &
9 Policy Center. I don't intend to and have no desire to
10 repeat arguments that been made by other counsel in this
11 hearing today.

12 I would like to briefly note that the
13 Attorney General supports and concurs in the arguments
14 advanced by Ms. Kearney, Mr. Olson, Mr. Bzdok, and the
15 concerns raised by Mr. Clark on behalf of Bay Mills.

16 Having said that, I would like to briefly
17 address what I see as two fundamental flaws in the
18 applicant's -- that is Enbridge's -- position on the
19 scope of MEPA review in this case.

20 First, on its face the application that
21 initiated this proceeding seeks to relocate and replace a
22 segment of Line 5 in a tunnel. That is an intrinsic and
23 indeed essential part of what they are applying for.
24 Accordingly, whether or not one analyzes the Commission's
25 authority to approve or disapprove a tunnel, at a minimum

1 the activity, the conduct that is proposed to be
2 authorized by the Commission, would include putting a new
3 segment of pipeline in the tunnel that is part of this
4 project, indeed the core of its project. As such, the
5 Commission in exercising its duty under MEPA to consider
6 the potential adverse environmental impacts of the
7 project necessarily has to consider and allow, for
8 purposes of this motion, allow the parties to present
9 evidence, both to seek discovery of and present evidence
10 relating to the environmental impacts of the construction
11 of the tunnel.

12 Second, Enbridge's framing of the issue
13 inappropriately seeks to limit the scope of the review of
14 MEPA necessarily -- the MEPA evaluation that's required
15 here -- to the four-mile segment of the tunnel that they
16 propose to relocate. Excuse me, the four-mile segment of
17 the pipeline they propose to relocate in the tunnel.

18 Simply put, this project, that segment of
19 pipeline does not exist in isolation. The very reason
20 they're proposing to do this is to extend the operation
21 of the entirety of Line 5, which as a matter of record
22 extends throughout Michigan, and in so doing, by seeking
23 to perpetuate that activity, I submit that the
24 Commission's review under MEPA necessarily should allow
25 consideration of the direct and indirect environmental

1 impacts of that exhibit.

2 So for example including, as has been
3 argued by other parties, the impacts on air emissions, a
4 whole range of impacts, the impacts of the construction
5 itself, and the impact of continuing to push these
6 products, including oil, through the entire length of
7 Line 5 in Michigan.

8 So to summarize very briefly, we ask that
9 you deny Enbridge's motion which seeks to arbitrarily and
10 unreasonably limit the scope of duty of this case.

11 JUDGE MACK: Is that it, Mr. Reichel?

12 MR. REICHEL: Yes, it is.

13 JUDGE MACK: You broke up a little there.
14 O.K. Thank you. I appreciate it. Mr. Sattler, Staff's
15 response.

16 MR. SATTLER: Thank you, your Honor. At
17 this point you've heard from Enbridge, who wants to limit
18 the scope of this proceeding as much as possible to even
19 exclude the tunnel construction and its environmental
20 impacts from the scope of the case. And you have heard
21 from some intervening parties who want to expand the
22 scope of the proceeding as much as they can, to even
23 encompass the future of the entire fossil fuel industry.
24 Staff perceives some strong points from both sides and
25 advocates a path forward that is less restrictive than

1 Enbridge proposes but not as expansive as some of the
2 intervening parties want.

3 Specifically, Staff's proposed scope
4 would encompass the four factors that Staff laid out in
5 its written response as it relates to the tunnel and the
6 pipeline, as well as the tribal rights to fish in the
7 Straits and the Great Lakes that would be affected by the
8 project.

9 But Staff's proposed scope would not
10 include extraneous issues that some intervening parties
11 want included, like growth in the electric vehicle market
12 or disinvestment trends in the fossil fuel industry.
13 These trends would exist regardless of whether the
14 Commission approves Enbridge's proposed project. And the
15 Commission has never before considered these factors when
16 deciding whether to approve an application to replace a
17 pipeline segment.

18 Now, I know that you have read Staff's
19 written response to Enbridge's motion *in limine*, but I
20 want to emphasize two points from Staff's response.
21 Before I get there, however, I want to address some of
22 Enbridge's arguments that it made earlier today.

23 Enbridge, relying on the Supreme Court's
24 Union Carbide case, argues that the Commission does not
25 have explicit authority to consider a tunnel in its

1 review of Enbridge's Act 16 application, essentially
2 because there is no clear unmistakable authority in Act
3 16, according to Enbridge, over the tunnel.

4 Staff's response is similar in many
5 respects to Mr. Bzdok's response on behalf of his
6 clients. First, Enbridge's argument assumes that the
7 tunnel is not a fixture, which as Staff explained in its
8 initial brief it is, it is a fixture of the pipeline.

9 And beyond this, Enbridge's reliance on
10 Union Carbide is misplaced. Enbridge argues that under
11 Union Carbide the Commission only has the authority
12 granted by the legislature, and this authority does not
13 include considering a tunnel where the pipeline would be
14 routed. The Union Carbide case, however, did not involve
15 Act 16. It primarily involved the MPSC Act and whether
16 the Commission could prevent the utility from operating
17 plant by an economic order.

18 Unlike the MPSC Act, Act 16 gives the
19 Commission broad authority over shippers and requires
20 them to gain Act 16 approval before taking specific
21 actions described in the Act. First there is MCL 43.1
22 sub section 2, which prohibits pipeline companies from
23 engaging the pipeline business except as authorized by
24 Act 16, or from locating, maintaining, or operating the
25 necessary pipelines, fixtures, and equipment, except

1 again as authorized by the statute.

2 And then there's MCL 43.2(b), and that's
3 another example of authority granted under Act 16. It
4 requires pipeline companies to minimize the physical
5 impact of pipeline construction and repair.

6 And finally, there's MCL 42.6, which is
7 another example of authority granted under Act 16. It
8 requires utilities to file -- well, pipelines rather, to
9 file certain information about pipeline projects they are
10 proposing.

11 These sections are not simply an outlying
12 jurisdiction, and Enbridge has not pointed to a single
13 case showing that they are simply an outlying
14 jurisdiction. Besides this, Act 16 gives the Commission
15 rule making authority and, as other parties have pointed
16 out, through this rule making authority that the
17 Commission has required pipeline companies in Rule 447,
18 sub section c, to file applications before constructing
19 facilities to transport crude oil, petroleum, or crude
20 oil petroleum products. So the lists of authority
21 granted under Act 16 is pretty long, as you can see.

22 I would also point to the Lakehead
23 decision, which was the case involving, as you know,
24 Enbridge's predecessor in interests. And in that case
25 the Michigan Supreme Court considered an appeal of

1 Lakehead's Act 16 application for Line 5 and the
2 Commission order approving it. And the Court held that
3 Lakehead complied in all respects to proceed as specified
4 by Act 16. And in light of the Lakehead decision, there
5 can be no serious dispute that Act 16 allows the
6 Commission to require an application, and the Supreme
7 Court acknowledged this practice almost 70 years ago, and
8 the Commission has required applications to be filed ever
9 since.

10 I could also cite in response to Enbridge
11 a line of cases that specify that the clear and
12 unmistakable requirement, that the Supreme Court has
13 outlined, does not necessitate separate legislative
14 endorsement for each action taken in the course of
15 administering authority given an agency under a statute.

16 I'll cite just one case for that,
17 although there are several. It's a Consumers Energy
18 case, 279 Mich App 180, page 190. In other words, what
19 this line of cases is saying is that the word, at least
20 as they're applied in this situation, is that the word
21 "tunnel" does not need to appear in Act 16 for the
22 Commission to have authority to review the tunnel as part
23 of its overall siting authority.

24 Moving on, I also have two points of
25 clarification before I talk about Staff's written

1 response. First, Mr. Ashton quoted Staff's position that
2 the current operational safety of Line 5 as a whole is
3 outside the scope of this case. I want to be clear that
4 this is distinguishable from the environmental impact of
5 the portion being replaced and routed within the tunnel,
6 which is within the scope the case.

7 Second, I want to address your earlier
8 question, your Honor, I believe it was to Enbridge, about
9 the impact of EGLE's permitting on the Commission's
10 decision on this case. Staff absolutely intends to
11 consider EGLE's permits, which it expects to be issued
12 before Staff files testimony in this case, when
13 evaluating the project's environmental impacts.

14 The Staff has been listening to various
15 public hearings and meetings related to the NPDES permit,
16 the wetlands permit, that EGLE will or will not be
17 issuing. So I just want you to know that we will be
18 watching those proceedings closely and will consider the
19 outcomes.

20 Now moving on to the points I want to
21 emphasize from my written response, and I'll try to keep
22 this relatively brief. The first point is that the
23 pipeline is going to be routed through the tunnel, and
24 the Commission has historically considered a pipeline's
25 route, both for new pipelines and replacement segments,

1 when considering whether to grant Act 16 approval for a
2 project.

3 Enbridge doesn't deny this, so the tunnel
4 as a route for the pipeline is unquestionably within the
5 scope of the case. And as such, it is part of the
6 overall project and it should be considered when
7 evaluating the four factors that Staff identified in its
8 written response.

9 JUDGE MACK: But Mr. Sattler, Staff, as I
10 indicated to Mr. Ashton, is not taking the position that
11 the Commission has the authority to approve or disapprove
12 the tunnel. Is that correct?

13 MR. SATTLE: That is correct, your
14 Honor. And I want to be careful because I'm always
15 careful when suggesting that the Commission doesn't have
16 authority or won't exercise its authority. The reason
17 that Staff was more comfortable arguing lack of authority
18 in this instance was because, really, the authority to
19 site the pipeline within the tunnel is for all practical
20 purposes equivalent to the authority to approve the
21 tunnel, because if the Commission doesn't approve siting
22 the pipeline within the tunnel, there's really no reason
23 to go forward with a tunnel, and again that would kill
24 the project. So in saying that the Commission lacks
25 authority to approve or disapprove the tunnel, we're

1 simply acknowledging the authority given to the Corridor
2 Authority, but we're not taking anything away from the
3 Commission, because a decision denying the application
4 here would likely kill the project.

5 And I want to talk about a hypothetical
6 that Enbridge raised at the prehearing. They talked
7 about how if the tunnel had been built for other purposes
8 before it filed its application, then we wouldn't be
9 talking about the tunnel. But the tunnel is not being
10 built in a vacuum as the hypothetical assumes.

11 Enbridge pledged in the tunnel agreement
12 that the tunnel was being built to accommodate the
13 pipeline. So the hypothetical is based on a faulty
14 premise. And also, if the tunnel had of been built
15 first, Staff would have known that the tunnel was
16 feasible, whether it was structurally sound, and the
17 specifications and features of the tunnel. We obviously
18 don't have the benefit of that information now because
19 the tunnel hasn't been built, but we should have all of
20 the information that we can possibly get in advance to
21 put us in the same position we would be in if the tunnel
22 had actually been built. I understand not all of that
23 information is available because the tunnel hasn't been
24 built, but again we should have as much of that
25 information as possible.

1 Enbridge attempts to draw a distinction
2 between considering this information when deciding
3 whether to locate the pipeline in a hypothetical tunnel
4 that has already been built and considering it when
5 evaluating construction of the actual tunnel that has not
6 been built. That was at least my understanding of Mr.
7 Ashton's argument earlier today. But if the Commission
8 could consider this information in a hypothetical tunnel,
9 we should be able to consider the same information when
10 evaluating whether the same tunnel should be constructed
11 as the location for the pipeline.

12 Also, given that the tunnel is part of
13 the overall project, the Commission has an obligation to
14 consider the tunnel when evaluating the four factors,
15 namely, the public need for the project, whether the
16 pipeline is routed in a reasonable manner -- routed and
17 designed; third, whether the project is constructed
18 consistent with applicable safety and engineering
19 standards, and fourth, whether or not the project would
20 impair the environment and if so, whether there are
21 feasible and prudent alternatives to the impairment.

22 JUDGE MACK: And Mr. Sattler, then that
23 would also entail the tunnel construction itself, the
24 environmental impacts?

25 MR. SATTLER: Yes, your Honor.

1 JUDGE MACK: And Staff would then examine
2 and presumably put on evidence concerning that issue, the
3 environmental impacts of the tunnel?

4 MR. SATTLER: Yes. At this point that's
5 the plan, your Honor.

6 JUDGE MACK: O.K.

7 MR. SATTLER: Now this doesn't mean that
8 the scope should be expanded to consider feasible and
9 prudent alternatives to Line 5 as a whole, but we're just
10 talking about the specific four miles of pipeline that
11 have been proposed to be replaced.

12 And here I think it's a good time to
13 respond to the MEC's and some of the Tribes argument that
14 the Commission should be considering feasible and prudent
15 alternatives to Line 5 as a whole. In order to reach
16 this conclusion, the MEC and the Tribes assumed that the
17 entire Line 5 will operate for decades to come if the
18 application in this case is granted. I think that For
19 Love of Water talked about the pipeline being in
20 operation for 99 years.

21 But there is no reason to believe that
22 the design life of the -- I'm sorry, that the life of the
23 entire pipeline would be extended, your Honor. Other
24 portions would need to be replaced. And that's the
25 problem with some of the intervening parties' positions.

1 They assume that the pipeline's life will be extended
2 almost indefinitely if the Commission grants the Act 16
3 application, and they seem to assume that Line 5 will
4 stop operating or operate at reduced levels if the Act 16
5 application was rejected. But there is really no basis
6 for these assumptions. To facilitate the shifts in
7 volumes transported through the pipeline there would have
8 to be a shift in demand. Otherwise, Enbridge or other
9 oil and gas companies would just figure out a different
10 way to get their product to market. And as Staff said in
11 its written response to Enbridge, shifting the
12 transportation of Line 5's products to an alternative
13 pipeline or mode of transportation, like rail or truck or
14 barge, won't materially affect demand.

15 Also, the MEC suggested they didn't
16 quite understand Staff's notice argument. Staff's notice
17 argument is that the notice that was provided in this
18 case didn't put potential parties on notice that we would
19 be re-evaluating the need for the entire Line 5 or
20 considering shutting down the whole line, which seems to
21 be what some of the parties want to do. The notice
22 focused on replacement and approval to operate or retain
23 the replacement pipe segment. It also addressed the
24 right to locate the pipeline in the tunnel.

25 I think that if the notice had been

1 broader to encompass all of Line 5 and re-evaluating the
2 need for all of Line 5, that we would have potentially
3 had additional producers intervening because their right
4 to ship on Line 5 would have been at stake. I don't
5 think they saw the notice and thought that their current
6 shipping arrangements would be at risk.

7 This is a segue into the second point
8 that I want to make or emphasize from Staff's written
9 response, which is that expanding the scope of the case
10 as broadly as some parties suggest would really bog down
11 the record and lead to speculation.

12 I think For Love of Water's arguments, as
13 an example, they argue that long-term market trends
14 suggest that the need for infrastructure, that is fossil
15 fuel related infrastructure, is decreasing, and they talk
16 about BP restructuring its business model and oil and gas
17 producers going into bankruptcy. And they talk about the
18 cancellation of tar sands projects, and they even talk
19 about foreign countries' oil and gas policies. These
20 issues fall far afield from the question at issue in this
21 case, which is related to the specific pipeline segment
22 that Enbridge wants to replace underneath the Straits of
23 Mackinac.

24 In any case, if FLOW, or rather For Love
25 of Water, is right, that demand for light crude oil

1 shipped on Line 5 is indeed declining, then it would
2 result in or -- yes, it would result in reduced
3 greenhouse gas emissions whether the project is approved
4 or not. The emphasis there is on demand for the crude
5 oil. And as Staff has pointed out, that demand is a
6 separate consideration from volumes transported on Line
7 5.

8 Let me restate that. In other words,
9 demand for light crude oil and the emissions that come
10 with it are largely independent of the mode of transport,
11 that mode of transport being along Line 5.

12 So discussions about long-term trends,
13 your Honor, in the fossil fuel industry, although they
14 have merit in their own right, they don't belong in this
15 contested case. Debate about this issue would clog the
16 record and could lead to delay in this contested case if
17 the case were expanded to include all of those issues.

18 So Staff asks that your Honor establish
19 the scope consistent with the scope that Staff proposed
20 in its written response. And that is it for me today.
21 And unless you have further questions, I'll rest on
22 Staff's written response.

23 JUDGE MACK: Thank you, Mr. Sattler. I
24 appreciate your argument. Let's go off the record.

25 (Brief discussion held off the record.)

1 JUDGE MACK: We are back on the record.
2 While we were off the record, I asked if any of the other
3 parties wanted to make a response. And we will get a
4 response from the Mackinac Straits Corridor Authority.
5 Go ahead, please.

6 MR HOWD: Yes, your Honor. Thank you.
7 Mr. Bzdok indicated that the Straits Corridor Authority
8 had agreed with the position of Staff, PSC Staff, and
9 that is true. But having heard yet more of the detailed
10 argument, this is one area that I think we are in
11 disagreement, and that would be the role for considering
12 the tunnel, the construction of the tunnel itself.

13 And what the Corridor Authority would
14 have in mind would be that -- and it will present written
15 testimony concerning the designs, specifications, and all
16 of the qualities of this tunnel, but the Commission
17 should consider the tunnel as constructed pursuant to
18 those designs. As Mr. Sattler indicated, that right now
19 we have a hypothetical tunnel, and so with the testimony
20 that will be given about the construction and the design
21 specifications, then the Commission could consider those,
22 that testimony, as it relates to the design and route,
23 pipeline being designed and routed in a reasonable
24 manner, and that the construction of the pipeline will
25 meet or exceed current safety or engineering standards.

1 The Commission should not consider as a
2 separate agency the actual construction of the tunnel and
3 the environmental impacts caused by that, simply because
4 EGLE is already doing that, and the Army Corps of
5 Engineers will be filing the National, the NEPA, and so
6 it's possible that we could have conflicting decisions.

7 And so we would propose, you know, that
8 the Commission, the scope of the consideration of the
9 construction of the tunnel would only be assuming that it
10 is constructed according to the design specifications,
11 would it in fact meet these requirements, not whether the
12 construction of the tunnel itself should be examined as a
13 stand-alone in addition to the relocation of the pipes
14 into the tunnel as constructed.

15 JUDGE MACK: And it's your belief that
16 you will have those specifics, all that information when
17 we get to the date for the filing of testimony? Because
18 I saw some indication in the pleadings that it's rather
19 preliminary at this stage?

20 MR HOWD: It's my understanding that the
21 specifications are 90 percent complete and should be
22 completed within the next month or two. And so those
23 would be in, and the Corridor Authority through its
24 consultant will be reviewing those and jointly with
25 Enbridge. And yes, we'll have final design plans ready

1 for the time the testimony is ready.

2 JUDGE MACK: And would put that on this
3 record as a --

4 MR HOWD: Correct.

5 JUDGE MACK: Thank you. I appreciate
6 that. Anything else, Mr. Howd?

7 MR HOWD: No, that is all I wanted to
8 raise.

9 JUDGE MACK: I appreciate that. Were
10 there any other intervenors that wanted to respond?
11 Hearing none.

12 Mr. Ashton, do you have any reply you
13 would like to make?

14 MR. ASHTON: Yes, your Honor, and just
15 very briefly. There's basically, I think to clean up the
16 record here, I think there's two issues that I'd like to
17 address.

18 One relates to the Exhibit A-9, which was
19 used by the Joint respondents, or as I refer to them the
20 Michigan Environmental Council, and the other
21 intervenors. Exhibit A-9, they act as if or they
22 represent Exhibit A-9 as having somehow representing a
23 commitment to seek a certificate of public convenience
24 and necessity for the tunnel. And that's simply not what
25 Exhibit A-9 is.

1 Exhibit A-9 was a preliminary assessment
2 done by Enbridge pursuant to an agreement with the State
3 of Michigan to see the feasibility, to determine the
4 initial feasibility of constructing a tunnel to relocate
5 the pipeline, so it was a preliminary analysis. And that
6 preliminary analysis was done well before the passage of
7 Act 359. So what you have there or what you were shown
8 on that one page on Exhibit A-9 was just a preliminary
9 assessment of what might, what would be needed or may be
10 needed. And it's a -- I think it's a stretch to say that
11 Enbridge in any way, shape, or form in that early
12 preliminary document was committing to a requirement that
13 the Commission has jurisdiction over the tunnel; it
14 simply is not accurate.

15 We're here to get approval to locate the
16 pipeline into the tunnel. But I guess the main point or
17 the main point of emphasis I want to make is that Exhibit
18 A-9, I wouldn't rely on that significantly because
19 that -- or at all -- because it was prior. That was
20 issued well before Act 359 which laid out, the Michigan
21 legislature laid out the process and who would have
22 jurisdiction over the tunnel and how the tunnel would be
23 constructed.

24 So the statements made in Exhibit A-9
25 were preliminary and made well before the passage of Act
Metro Court Reporters Inc. metrostate@sbcglobal.net

1 359. So there really wasn't a change in Enbridge's
2 position or, you know, a commitment back at the time when
3 Exhibit A-9 was created.

4 The next issue I think I want to
5 discuss, and it's the last one, that is the need for the
6 project. I think counsel for FLOW and counsel for the
7 Michigan Environmental Council looked at -- Typically the
8 counsel for FLOW, Mr. Olson, you know, stressed that Line
9 6b and pointed to the need there, and was showing that
10 there was a -- that the Commission looked at the economic
11 need for the project.

12 Here, this case has nothing to do with
13 the economic need for Line 5. As we cited in our
14 application and in our motion, the Commission and the
15 Supreme Court already found the economic need for Line 5
16 back in 1953, and our other statements in our application
17 show that there is that continuing need. It was not
18 opening the door to determine whether the need existed;
19 it was explaining what the past determination was and how
20 the current pipeline is currently being utilized.

21 The need for this project is very
22 straightforward and simple. The need is to protect the
23 Great Lakes. That is, if you look at the first, second,
24 and third agreements entered into between Enbridge and
25 the State of Michigan, the focus of why we're building

1 this pipeline is not to extend the life of Line 5, it is
2 to meet our commitment to secure the Straits crossing
3 within a tunnel. Why? Because the State of Michigan
4 wanted that to happen. They insisted on it happening.
5 My client agreed to spend \$500 million to make that
6 happen.

7 It was not to -- that this notion, that
8 the need for this project is somehow the need to extend
9 the life of Line 5 is simply a red herring. It's not.
10 Line 5 will continue to operate as long as there is
11 demand for that transportation service, whether we're in
12 the tunnel or on the lake bed.

13 We have the legal right to continue to
14 operate Line 5. The Commission has given us the right to
15 operate and maintain Line 5. The 1953 easement gives us
16 a right to operate and maintain the Great Lakes -- the
17 Straits Crossing on the lake bed indefinitely. So the
18 idea that this project has some kind of economic need or
19 some economic benefit for Enbridge, or that it prolongs
20 the life of Line 5, is simply misplaced and erroneous and
21 is a red herring to try to open the door for all sorts of
22 discovery and evidence that doesn't belong in this
23 proceeding.

24 The need you can see straight from our
25 exhibits. Those are the three agreements with the State.

1 The State insisted on getting additional protection for
2 the Great Lakes. They wanted to secure the pipeline off
3 the floor of the Great Lakes, off the Straits, and into
4 the tunnel. My client agreed.

5 Now ironically, the environmental groups
6 say: Oh, no, no, don't do that. We would prefer to be
7 on the bottom of the Great Lakes. That's simply absurd.
8 We shouldn't be opening the door to evidence regarding a
9 need determination that was made in 1953 and which the
10 intervenors acknowledge can't be undone in this case.

11 And those were really the only two main
12 points that I wanted to respond to, unless you had any
13 additional questions.

14 JUDGE MACK: No, I don't, Mr. Ashton.
15 Thank you. I appreciate that.

16 I want to thank the parties for their
17 argument today. It was very helpful. And I also wanted
18 to note that the briefs were also very helpful. So I
19 will issue an order consistent with the scheduling memo
20 by October 23. And we will conclude this oral argument.
21 Thank you, everybody.

22 (Multiple "Thank you, your Honor.")

23 (At 4:20 p.m., the motion hearing concluded.)

24 - - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Marie T. Schroeder, CSR-2183, do hereby certify that I reported in stenotype, via Microsoft Teams, the proceedings had in the within-entitled matter, that being Case No. U-20763, before Dennis W. Mack, Administrative Law Judge with MOAHR, at the Michigan Public Service Commission, Lansing, Michigan, on Wednesday, September 30, 2020; and do further certify that the foregoing transcript, consisting of Volume 2, Pages 92-212, is a true and correct transcript of my stenotype notes.

Marie T. Schroeder, CSR-2183
metrostate@sbcglobal.net
(248) 360-8865

Dated: October 5, 2020