

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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Application of Enbridge Energy, Limited)
Partnership for the for the Authority to Replace)
and Relocate the Segment of Line 5 Crossing)
the Straits of Mackinac into a Tunnel Beneath)
the Straits of Mackinac, if Approval is Required)
Pursuant to 1929 PA 16; MCL 483.1 et seq.)
and Rule 447 of the Michigan Public Service)
Commission's Rules of Practice and)
Procedure, R 792.10447, or the Grant of)
other Appropriate Relief.)

Case No. U-20763

RULING ON MOTION *IN LIMINE*

Under a schedule set during the August 12, 2020 pre-hearing conference, Enbridge Energy, Limited Partnership (Enbridge) filed a Motion *in Limine*. Responses to the Motion were filed by: Michigan Environmental Council, Grand Traverse Band Of Ottawa and Chippewa Indians, Bay Mills Indian Community, Tip Of The Mitt Watershed Council, and National Wildlife Federation (Joint Response); For Love of Water (FLOW); Environmental Law & Policy Center's and Michigan Climate Action Network (ELPC); Attorney General; Michigan Propane Gas Association and the National Propane Gas Association (Associations); and Public Service Commission Staff (Staff). Oral Argument on the Motion was heard on September 30, 2020.

In its Motion Enbridge seeks a ruling that essentially sets the scope of hearing in two regards. First, it seeks to exclude as legally irrelevant any evidence on the following issues:

(1) the construction of the utility tunnel; (2) the environmental impact of the tunnel construction; (3) the public need for and continued operation of Line 5; (4) the current operational safety of Line 5; (5) whether Line 5 has an adverse impact on climate change; and (6) the intervening parties' climate change agendas.
Motion, pgs. 1-2.

Second, it seeks a ruling that limits the evidence to the following issues:

(A) is there a public need to replace the existing Line 5 crossing of the Straits with a pipe segment relocated in a utility tunnel beneath the Straits; (B) is the replacement pipe segment designed and routed in a reasonable manner; and (C) will the construction of the replacement pipe segment meet or exceed current safety and engineering standards[.]
Id., pg. 2.

Enbridge argues the relief it seeks in the Motion is warranted by the scope of the activity proposed in the Application at issue in this case and the Commission's jurisdiction under Public Act 16 of 1929 (Act 16) that provides the authority to regulate that activity.

The Commission has provided a detailed recitation on the history and transportation capacity of the Line 5 pipeline (Line 5) based on Enbridge's Application, including the segment that currently crosses the Straits of Mackinac and the proposal to relocate it into a Utility Tunnel beneath the Straits. Case No. U-20763, June 30, 2020 Order, pgs. 1-5. The Commission recognized, but declined to address, one of the issues raised in the Motion: whether the proposed Utility Tunnel that will house the relocated pipeline is within the scope of its review under Act 16. *Id.*, pg. 58. However, in denying Enbridge's request for *ex parte* approval of its Application and setting the matter for hearing, the Commission addressed its jurisdiction under Act 16:

The Commission notes that, as set forth in its title, the purpose of Act 16 "is to regulate the business of carrying or transporting, buying, selling, or dealing in crude oil or petroleum or its products" and "to provide for the control and regulation of all corporations, associations, and persons

engaged in such business, by the Michigan public service commission....”
In addition, Section 1(2) of Act 16 states, in relevant part:

A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof . . . by or through pipe line or lines . . . or exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof . . . does not have or possess the right to conduct or engage in the business or operations, in whole or in part, **or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment belonging to . . . except as authorized by and subject to this act.**

MCL 483.1(2) (emphasis added). Based on the above language, the Commission finds that it has broad jurisdiction over the construction and operation of pipeline facilities and has the “authority to review and approve proposed pipelines, and to place conditions on their operations.” March 7, 2001 order in Case No. U-12334 (March 7 order), p. 13, citing Dehn, 340 Mich at 41; see also, January 31, 2013 order in Case No. U-17020 (January 31 order), p. 5. Moreover, “[i]nherent in that jurisdiction is the power to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest.” March 7 order, p. 14. Case No. U-20763, June 30, 2020 Order, pg. 59.

The Parties also agree that in prior decisions the Commission has established the general criteria for deciding an application filed under Act 16: whether the applicant has established a public need for the proposed pipeline; whether the proposed pipeline is designed and routed in a reasonable manner; and whether the construction of the pipeline will meet or exceed current safety and engineering standards.¹ In addition, in reviewing the Application the Commission is to consider the applicable provisions of the Michigan Environmental Protection Act (MEPA). MCL 324.1701, et seq.; *State Highway*

¹ See Motion, pgs. 16-17, citing Case No. U-17020, January 31, 2013 Order, pg. 5, and Case No. U-13225, July 23, 2002 Orders, pg. 4-5; Joint Response, pg. 7, citing Case No. U-17020, January 31, 2013 Order, pg. 5; FLOW Response, pg. 6, citing Case No. U-17020, January 13, 2013 Order, 5; Michigan Propane Gas Association & National Propane Gas Association, pg. 5, citing Case No. U-13255, July 23, 2002 Order; and Staff Response, pgs. 3-4, citing Case No. U-13225, July 23, 2002 Order, pgs. 4-5.

Commission v Vanderkloot, 329 Mich 159, 167-168 (1974). The Commission's statutory authority will control the determination of whether the issues raised in the Motion are proper for consideration in this case.²

1. The Utility Tunnel

There is no dispute that the activity proposed in the Application, replacing the existing two 20-inch diameter pipelines on the bottomlands with a single 30-inch diameter pipeline located in a Utility Tunnel under the lakebed, is subject to the Commission's jurisdiction under Act 16. Where the Parties diverge is on the question of what, if any, jurisdiction the Commission has over the Utility Tunnel. Enbridge argues the oversight of the proposed Utility Tunnel, including its construction and operation, is exclusively vested with the Mackinac Straits Corridor Authority (Corridor Authority) by virtue of its enabling statute, Public Act 329 of 2018 (Act 359). Specifically, that once constituted the Corridor Authority "may acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel." MCL 254.324a(1) and MCL 254.324d(1). To Enbridge, Act 359 provides the Corridor Authority with "specific and unequivocal jurisdiction..." over the Utility Tunnel, and "precludes the Commission..." from considering any aspect of its construction and operation because it lacks specific authority under Act 16 over that aspect of the project. Motion, pgs. 3, 9.

It is important to note that Act 359 does not divest regulatory oversight of the Utility Tunnel under applicable statutory schemes concerning its construction or use. MCL 254.324d(4)(g). Thus, while the Corridor Authority certainly has jurisdiction over

² The arguments of all the Parties were considered in issuing this Ruling, while only those deemed necessary to decide the issues are addressed.

the Utility Tunnel, its construction and use bring it, to some degree, under the jurisdiction of other governmental entities. For example, Enbridge is currently seeking regulatory approval for the Utility Tunnel from the Department of Environmental, Great Lakes, and Energy (EGLE) and the U.S. Army Corps of Engineers (Corps) under the statutory schemes they administer. Motion, pg. 6. Similarly, the relocation of the pipelines into the Utility Tunnel implicate the Commission's jurisdiction under Act 16. As noted, the issue raised in the Motion is the extent of that jurisdiction. Enbridge and the Associations argue that jurisdiction does not include the Utility Tunnel, with the other Parties arguing the jurisdiction extends, to differing degrees, to that portion of the project. That determination turns on the applicable provisions of Act 16.

The first provision cited by Staff, Joint Response, and FLOW vests the Commission with jurisdiction over “[a] person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof...through pipe line...does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment...except as authorized by and subject to this act.” MCL 483.1(2). The Parties opposing the limits on the Commission's consideration of the Utility Tunnel argue it is a fixture of Enbridge's pipeline operations, and thus a relevant issue under Act 16. Enbridge and the Associations contend the Utility Tunnel does not fall under §1(2) because it is neither a fixture nor equipment, and thus not a proper consideration in reviewing the Application.

Act 16 does not define the term “fixtures”, so it must be interpreted under the well-established rules of statutory construction:

“The primary goal of statutory interpretation is to give effect to the intent of the Legislature.” In re MCI Telecommunications Complaint, 460 Mich 396, 411 (1999). “Statutory interpretation begins with examining the plain language of the statute. When that language is clear and unambiguous, no further judicial construction is required or permitted.” In re Reliability Plans of Elec Utilities, ___ Mich ___; ___ NW2d ___ (2020) (Docket Nos. 158305–158308); slip 6 op at 11. If the meaning of a statute is in question, “[A] court must look to the object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute’s purpose.” In re Forfeiture, 432 Mich 242, 248 (1989).

Staff’s Response to Enbridge’s Petition for Rehearing, pgs. 5-6 (Dkt. #0240).

Staff, relying on the Black’s Law Dictionary, defines a “fixture” as personal property attached to land that is an “irremovable” part of the property. Response, pg. 10. Under this definition, Staff contends the Utility Tunnel is properly considered a fixture under Act 16 given that it will unquestionably be an irremovable component of real property that is integral to the safe operation of the relocated pipeline. While the Joint Response also provides a dictionary definition similar to the Black’s Law definition, it relies on a three-part test:

Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty.

Wayne County v Britton Trust, 454 Mich 608, 611 (1997), reaffirming *Morris v Alexander*, 208 Mich 387 (1919).

The Joint Response contends that the Utility Tunnel, which will be a permanent and useful attachment to the realty, meets the definition of “fixture” under long-standing Michigan law. Joint Response, pgs. 10-11.

Staff, the Joint Response, and FLOW also argue the Commission has authority to consider the Utility Tunnel based on an administrative rule promulgated under Act 16 pertaining to a proposal “to construct facilities to transport crude oil or petroleum products as a common carrier for which approval is required by statute.” R 792.10447(1)(c) (Rule 447).³ The Parties contend the term “facilities” must be construed consistent with the Commission’s authority under Act 16 to regulate any aspect of a proposed pipeline reasonably related to its operation. As Staff notes, the Utility Tunnel serves a number of functions in this regard: a protective layer for the pipeline; secondary containment in the event of a leak or spill; foundation for the pipeline’s support; housing for measures directly related to the safe operation of the pipeline, including leak detection, pressure monitoring and cathodic protection. Response, pg. 11.

Staff also argues the Commission has the authority to consider the Utility Tunnel under the requirement that “[a] pipeline company shall make a good-faith effort to minimize the physical impact and economic damage that result from the construction and repair of a pipeline.” MCL 483.2b. In support, and as it did under its §1(2) and Rule 447 argument, Staff notes the Utility Tunnel that Enbridge will construct is dependent upon, and thus inseparable from, the pipeline replacement project. Further, it is not possible to determine how Enbridge will construct, maintain, and undertake any repairs to the relocated pipeline without considering the Utility Tunnel’s design.

³ Rule 447 was promulgated under the authority of Act 16, and the Commission held the Application to relocate the pipeline into the Utility Tunnel implicates its provisions. Case No. U-20763, June 30, 2020 Order, pgs. 59-67.

Accordingly, Staff contends the Commission must be able to consider the Utility Tunnel to determine whether Enbridge has met its burden under §2b.

Enbridge argues the Utility Tunnel is a standalone structure that is being constructed under Act 359 to accommodate a host of utility infrastructure, one of which is its relocated pipeline. Therefore, it cannot be deemed a fixture under §1(2), a facility under Rule 447, or a consideration in quantifying the physical and economic impact from the construction pipeline under §2b. In effect, Enbridge is seeking to have the Commission undertake its Act 16 review of the project as if the Utility Tunnel has been designed, constructed, and placed into operation, which is obviously not the case. In fact, the development phase of the Utility Tunnel has not reached the point where design and construction plans are finalized. See Joint Response, pg. 13. Further, the relocated pipeline is not just one piece of utility infrastructure that will ultimately be in the Utility Tunnel, it is the entire reason Enbridge is undertaking the project. The argument that the Utility Tunnel and relocated pipeline are unrelated disregard the fact that those components are, for the reasons discussed, inextricably connected. Quite simply, Enbridge has agreed to construct and pay for the Utility Tunnel so it could relocate the existing pipelines. While the potential certainly exists for other infrastructure to be sited in the Utility Tunnel, under its agreement with the State the relocated pipeline has priority over those lines and facilities. See Joint Response, pg.12. Therefore, Enbridge's argument that the Utility Tunnel and pipeline are somehow separate and distinct considerations cannot be sustained.

As the Commission held in this case, the purpose of Act 16 is to ensure that pipelines are designed, routed, constructed, and operated in a safe and economical manner. See Case No. U-20763, June 30, 2020 Order, pg. 59; see also Case No U-13225, July 23, 2002 Order, pgs. 4-5. The only way to make that determination is for the Commission to have a record that contains all relevant information concerning the proposal to relocate the existing pipelines into the Utility Tunnel. That necessarily requires the development of a record on the design, construction, and operational aspects of both the pipeline and Utility Tunnel. Counsel for the Corridor Authority indicated during Oral Argument the plans for the Utility Tunnel will be completed while this case is pending and will be offered as evidence in this case. 2 TR 205-207.⁴ To exclude that evidence under Enbridge's Motion would effectively preclude the Commission from performing its statutorily mandated review of a project under Act 16. Having said that, Staff's contention that this case does not entail the "approval" of the Utility Tunnel is accurate. Rather this case entails a review of the proposal to relocate the pipeline into the Utility Tunnel that necessarily requires consideration of the design, construction, and operational features of both so as "to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest." Case No. U-20763, June 30, 2020 Order, pg. 59, citing Case No. U-17020, January 31, 2013

⁴ Counsel for the Corridor Authority indicated the submission of the plans are not intended as an indication that the Commission has the authority to "approve" the construction of the Utility Tunnel. 2 TR 205-207. Rather, it will be offered so the Commission can consider its specifications as part of its review of the Application under Act 16. Id.

Order, pg. 5.⁵ Finally, undertaking the inquiry required under Act 16 does not usurp the Corridor Authority's role under Act 359, but rather is entirely consistent that the requirement that the Utility Tunnel obtain all necessary regulatory approvals. MCL 254.324d(4)(g).

Based on the foregoing, under the definitions advanced by Staff and the Joint Response, particularly the *Morris* three-part test, the Utility Tunnel is a fixture as that term is used in Act 16.⁶ Concomitantly, the Utility Tunnel is a facility under Rule 447 and its design, construction and operation are relevant in considering Enbridge's Application to relocate the existing pipelines. Finally, to determine under §2b whether a good faith effort was made to limit the physical impact and economic damage that will result from the construction of the pipeline it is necessary to consider the Utility Tunnel. For these reasons, Enbridge's Motion *in Limine* concerning the scope of this case as it pertains to the Utility Tunnel is denied.

2. Operation of Line 5

The construction and operation of Line 5 was approved by the Commission in 1953 and subsequently deemed to be "for a public use benefiting the people of the State of Michigan." *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 37; 64 NW2d 903 (1954); Application, pg. 5. Based on this authority Enbridge contends any issue pertaining to the operation of Line 5 in its entirety, including the public need for that

⁵ Assuming, *arguendo*, the Application was filed after the Utility Tunnel was constructed, Act 16 would still require consideration of its design and operational features as it relates to a proposal to relocate the pipeline in it so the same determination of the system's safety and public interest could be made.

⁶ The Joint Response also argues the Utility Tunnel is "equipment" under §1(2). Since "fixtures" and "equipment" are necessarily distinct features as used in this provision, the conclusion the Utility Tunnel is properly considered the former renders this argument moot.

pipeline and its continued operation, are outside the scope of this case. Motion, pg. 13, Exhibit A-3. This aspect of the Motion is in response to certain arguments raised by various Parties in their Petitions to Intervene. Motion, pgs. 13-14. Enbridge also contends Act 359 establishes a continued public need for Line 5 by authorizing the Utility Tunnel for the replacement pipeline. As it pertains to the issue of safety and the current operation of Line 5, Enbridge notes that federal law preempts state regulation in that regard. See 49 U.S.C. §60104(c). Finally, Enbridge argues the fact that it filed an Application under Act 16 does not allow for a determination on whether Line 5 should continue operating. Any proceeding of that nature would equate to an agency action to suspend, revoke, or modify an existing license that implicates the Administrative Procedures Act (APA) procedural requirements. See MCL 24.292(1); see also *Rogers v. Michigan State Board of Cosmetology*, 68 Mich App 751 (1976).

Staff agrees with the limit sought by Enbridge as it pertains to the continued operation of Line 5, noting the 1953 approval and Supreme Court decision as controlling the issue, and the APA procedural requirements that would attach to an agency action seeking to limit or terminate its operation. Staff also notes that irrespective the outcome of this case, Enbridge retains the right under the 1953 easement and approvals to operate Line 5 as it is currently constituted, making any evidence on that point outside the scope of this case. As for the claims concerning the safety of Line 5, Staff notes it operates under a federal delegation for certain aspects of pipeline operations, but the Commission has historically not considered the operations of an entire pipeline when considering a proposal to replace a segment under Act 16. Response, pg. 16.

Accordingly, Staff concludes any evidence regarding the current and future operation of the entirety of Line 5 should be excluded. *Id.*, pgs. 15-16.

The Joint Response and FLOW advance a relatively expansive view of the relevance of Line 5 in this case. These Parties argue that the continued operation of the entirety of Line 5, including its safety, the public need, and potential environmental impacts, are all proper considerations for the Commission in reviewing the Application under Act 16. In general, these Parties contend that since the purpose and effect of the proposed relocation of the pipeline into the Utility Tunnel is to extend the operational life of Line 5 and remove the potential risks posed by the dual pipelines currently on the bottomlands, the issues concerning its entire operation are relevant. The Joint Response contends a review of the entirety of Line 5 is supported by Commission precedent and the June 30, 2020 Order opening this case. Regarding the latter, the Joint Response relies on a decision in a case involving Wolverine Pipe Line Company concerning the replacement of existing petroleum pipelines. In that case the Commission noted its “broad jurisdiction over the construction and operation of pipeline systems...” including “the power to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest.” Case No. U-13225, July 23, 2002 Order, pg. 6. Consistent with that jurisdiction the Commission undertook what is termed “a broad range of environmental risks associated with the project” that is also required in this case. Joint Response, pg. 31. The Joint Response also notes that in this case the Commission recognized “the significant public interest and concern regarding the Line 5 Project’s potential environmental impact on the Great Lakes...”,

which it argues warrants consideration of the entire system. Case No. U-20763, June 30, 2020 Order, pg. 69.

The Joint Response also challenges Enbridge's argument concerning the continued operation of Line 5, noting these Parties are not seeking a revocation of any prior approval, but only intends to enter evidence concerning whether a public need exists for the relocation of the pipeline into the Utility Tunnel. Joint Response, pgs. 32-33. Further, Enbridge's argument that the public need for Line 5 is established by the 1953 easement and *Lakehead Pipe Line Co., supra*, is misplaced given that the Commission held the proposed project "differs significantly..." from those actions and requires independent review under Act 16. Case No. U-20763, June 30, 2020 Order, pg. 58. The Joint Response also notes that the treaty rights of the Tribal nations that are a party to this case, along with the rights of those entities for meaningful consultation with the State on any subject that significantly affects their interests, require an examination of Line 5 in this case. To limit the scope of this case in the manner sought by Enbridge would diminish the Tribe's rights to "submit evidence regarding how the continued operation of Line 5 threatens their interests." Joint Response, pg. 35. Finally, the Joint Response argues that, contrary to Enbridge's assertion, federal law does not preclude the Commission from considering the environmental risks from the location and routing of a pipeline under Act 16 and MEPA. Based upon that consideration, which the Joint Response Parties intend to present evidence on, "the Commission may prohibit the siting of Line 5 in the Straits of Mackinac if the Commission determines that the location or routing is unreasonable." *Id.*, 38.

Similar to the Joint Response, FLOW argues the Act 16 public need analysis must include consideration of the entirety of Line 5 given that the project purpose is to extend its operation for 99 years. Response, pgs. 10-11. FLOW contends that analysis requires a quantification of the health, environmental, and climate impacts of extending the operational life of Line 5. In addition to Act 16, FLOW argues the analysis is required because Enbridge is a public utility seeking a Certificate of Necessity for the project, and MEPA requires a determination of whether the project is in the public interest.

The scope of this case is necessarily dictated by two factors. The first is the activity proposed in the Application: replace the existing 4-miles of dual pipelines located on the bottomlands under the auspices of the 1953 easement with a pipeline in a proposed Utility Tunnel as contemplated in Act 359 and various Agreements with the State. The second factor is the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority, and MEPA, which is addressed below. The Joint Response and FLOW contend consideration of the operational aspects of the entirety of Line 5 in conjunction with the proposed activity is warranted under Act 16 and other authority. Regarding the latter, just as Act 359 cannot serve to limit the Commission's jurisdiction, the converse is also true. For example, it is not in dispute that the Tribal nations have treaty rights in the Straits and other areas where Line 5 is located, and under Executive Directive No. 2019-17 a right to consultation before a decision of a state agency that may affect their interests is

implemented. See Joint Response, pgs. 19, 35-36. However, those rights cannot, standing alone, be a basis to expand the Commission's jurisdiction under Act 16.

As it pertains to Act 16, neither the Joint Response nor FLOW provide any substantive basis to determine the review of the project proposed in the Application requires a review of the operation of Line 5 in its entirety.⁷ As noted, the standards of Act 16 are well established and must be applied in this case. See Case No. U-20763, June 30, 2020 Order, pg. 59, 65-67.⁸ Based on those standards, this case involves a review of the proposed pipeline relocation under Act 16 to determine whether a public need exists for it, whether it is designed and routed in a reasonable manner, and whether its construction will satisfy applicable safety and engineering standards. Accordingly, any issues concerning the current or future operational aspects of the entirety of Line 5, including the public need for the 645-mile pipeline that was approved by the Commission in 1953 and affirmed in *Lakehead Pipe Line Co., supra.*, is outside the scope of this case.⁹ Undoubtedly, the prior approval of Line 5 and enactment of Act 359 as a means to remove the dual pipelines from the bottomlands certainly go to the public need for the proposal under consideration in this case. However, that authority

⁷ It is unclear under what statute FLOW bases its argument that Enbridge is a public utility and is seeking a certificate of necessity for the relocated pipeline that warrants a review of the entirety of Line 5. Response, pgs. 11-12; 2 TR 147. If the Argument is based on Act 9 or Act 69, the Commission held in the Order opening this case Enbridge is not a public utility under either. Case No. U-20763, June 30, 2020 Order, pg. 61. In any event, as Enbridge noted during Oral Argument, it is not seeking a certificate of public convenience and necessity for the project due to the enactment of Act 359. *Id.*, 207-208.

⁸ The Joint Response's characterization of *Wolverine* (Case No. U-13225, July 23, 2002 Order) as standing for the proposition that Act 16 requires an examination of the entire pipeline system cannot be accepted. A fair reading of *Wolverine* is the Commission applied the Act 16 standards to the portion of the pipeline proposed to be replaced.

⁹ Enbridge's argument that the safety operational aspect Line 5 is pre-empted by federal law, and the Joint Response's argument that the location and routing of a pipeline are not pre-empted and implicate safety, are immaterial because any consideration of the operational aspects of the entirety of Line 5 is beyond the scope of the issue in this case.

does not, as Enbridge argues, end the inquiry on that point. Act 16 requires the Commission determine, *inter alia*, whether a public need for the proposed project has been established, and the Parties have the right to enter evidence and make argument on whether that requirement has been satisfied.

Based on the foregoing, any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues, is outside the scope of this case. Therefore, Enbridge's Motion *in Limine* concerning the current operational aspects of Line 5 is granted.

3. Michigan Environmental Protection Act

MEPA requires that in a licensing proceeding an agency determine whether the conduct under review will pollute, impair, or destroy the natural resources, or the public trust in those resources, and if so not approve the conduct if a feasible and prudent alternative exists that is consistent with reasonable requirements of the public health, safety, and welfare. MCL 324.1705(2). Enbridge raises two arguments concerning the application of MEPA to its proposed project: 1) it does not apply to the Utility Tunnel, and; 2) it does not allow for the consideration of climate change in determining whether to approve the project under Act 16. Motion, pgs. 11-12, 15-16. Accordingly, the Motion seeks a determination that any evidence concerning either issue be disallowed. Staff agrees that MEPA does not allow consideration of climate change in considering the impact of the proposed activity, nor is it a means to expand the Commission's review under Act 16 to the entirety of Line 5. Response, pg. 16.

Enbridge's argument that MEPA cannot be considered relative to the construction of the Utility Tunnel is premised on its contention that all aspects of that portion of the project is outside the scope of Act 16. However, given the conclusion the Utility Tunnel is a "fixture" under §1(2), a "facility" under Rule 447, and a necessary component of the determination under §2b on whether a good-faith effort is made to minimize the physical impact and economic damage from the construction of the pipeline, that contention cannot be sustained. Because the Utility Tunnel must be considered in determining whether the project can be approved under Act 16, it is necessarily part of the "conduct" in a licensing proceeding subject to review under MEPA. However, it is recognized that EGLE and the Army Corps of Engineers will also review the construction of the Utility Tunnel under the respective substantive resource protection statutes they administer, and some degree of deference must be afforded those determinations. This, in turn, allows the Commission to rely on the expertise of those agencies as part of its MEPA review, and avoids the potential for conflicting results between the agency decisions.¹⁰

This leaves the issue of whether the "conduct" reviewed under MEPA entails the environmental effects of the use of the fossil fuels, specifically greenhouse gas emissions that the intervening parties contend contribute to climate change. The ELPC, along with FLOW and the Joint Response, argues that greenhouse gases contribute to climate change that results in the pollution, impairment, and destruction of the air, water,

¹⁰ Staff is monitoring the processing of the applications pending before EGLE and intends to factor the ultimate decisions on them into its MEPA analysis of the project, including the Utility Tunnel. 2 TR 197, 200-201.

and other natural resources, and thus are proper considerations under MEPA.¹¹ The ELPC also notes that administrative agencies are considering greenhouse gas emissions and the resultant environmental impact is occurring on both the federal and state level, and thus is appropriate with a review of the project in this case under Act 16.

As noted, MEPA requires an examination of the “conduct” to determine its effect on the natural resources. The conduct in this case is the activity proposed in the Application and subject to the Commission’s jurisdiction under Act: the replacement of the existing pipelines on the bottomlands with a pipeline in a Utility Tunnel. In effect, the Parties opposing the exclusion of evidence concerning greenhouse gases and climate change are advancing a quite broad interpretation of the “conduct” that is subject to review under MEPA. Specifically, consideration of the environmental effect of the oil transported on the pipeline after it is refined and placed in the market for consumption would also extend the conduct to the extraction and refinement processes. While the Parties opposing the Motion provide a great deal of argument on the deleterious effect on the environment from greenhouse gases and climate change, they do not provide any substantive legal basis to support such a broad construction of the term “conduct” in MEPA.

A similar expansive definition of conduct was raised in a case on an application to construct and operate natural gas pipelines under Act 9. MCL 483.101 *et seq.* In those cases, the parties challenging the application argued the pipelines would serve as

¹¹ FLOW also argues that MEPA and public trust doctrine requires an examination of the entirety of Line 5, including in relation to other pipelines in the State and North America. Response, pgs. 22-26. Consistent with the ruling that the scope of this case is controlled by Act 16, and it cannot by implication be constricted or expanded by other authority, this argument is rejected.

“bait” for new production wells in the area that would use hydraulic fracking and cause forest fragmentation, and the environmental harms from both must be considered under MEPA. The Commission rejected the argument and held that it lacked jurisdiction over the drilling of gas wells and the extraction process and would limit its review and MEPA analysis to the issue over which it had jurisdiction, the construction and operation of the pipelines. Case Nos. U-17195/U-17196, September 23, 2015 Order, pg. 7; see also *Buggs v Public Service Commission, et al.*, unpublished per curium decision of the Court of Appeals, issued May 16, 2017 (Docket Nos. 329781 and 329909). The same principle applies in this case, the Commission lacks jurisdiction over greenhouse gas emissions that may result from oil shipped on Line 5 after it is refined and consumed. Rather, the Commission’s jurisdiction under Act 16 is over the proposal to relocate the existing pipelines into the Utility Tunnel, and a component of that jurisdiction is examining the environmental impacts of that conduct under MEPA.

Based on the foregoing, consistent with Act 16 and as it pertains to MEPA, the conduct at issue in this case does not include the environmental effects from the extraction, refinement, or consumption of the oil transported on Line 5. Therefore, any evidence in that regard, including the environmental effect of greenhouse gas emissions and climate change, is irrelevant.

RULING

Consistent with the foregoing, Enbridge’s Motion *in Limine* is:

1. Denied as it pertains to the Utility Tunnel.
2. Granted regarding the operational aspects, including the public need and safety, of the entirety of Line 5.

3. Granted as it pertains to the review of the project under MEPA does not entail the environmental effects of greenhouse gas emissions and climate change.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Dennis W. Mack
Administrative Law Judge

October 23, 2020
Lansing, Michigan

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

STATE OF MICHIGAN)
)
County of Ingham)
_____)

Case No. U-20763

PROOF OF SERVICE

Meaghan Dobie being duly sworn, deposes and says that on October 23, 2020, she served a copy of the attached Ruling on Motion *in Limine* via email and/or first-class mail, to the persons as shown on the attached service list.

Meaghan Dobie

Subscribed and sworn to before me
this 23rd day of October 2020.



Brianna L. Brown
Notary Public, Clinton County
My Commission Expires July 4, 2021

**SERVICE LIST
CASE NO. U-20763**

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