November 6, 2020

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

Via E-filing

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following are attached for paperless electronic filing:

- Application for Leave to Appeal the Administrative Law Judge's Ruling on Motion in Limine by Bay Mills Indian Community, and
- Proof of Service

Sincerely,

Christopher M. Bzdok
Chris@envlaw.com

xc: Parties to Case No. U-20763

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership 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	MPSC Case No. U-20763 ALJ Dennis Mack

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APPLICATION FOR LEAVE TO APPEAL THE ADMINISTRATIVE LAW JUDGE'S RULING ON MOTION IN LIMINE BY BAY MILLS INDIAN COMMUNITY

November 6, 2020

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Under Michigan Public Service Commission Rule 433, Bay Mills Indian Community ("Bay Mills") submits this Application for Leave to Appeal the October 23, 2020 decision of Administrative Law Judge ("ALJ") Dennis W. Mack granting Enbridge Energy, Limited Partnership's ("Enbridge") Motion in Limine in part. In support of this Application, Bay Mills submits the following brief.

Bay Mills also incorporates by reference the Application for Leave to Appeal the Administrative Law Judge's Ruling on Motion in Limine by Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, and National Wildlife Federation, and as well as the Brief in Support of Application by the Environmental Law & Policy Center and Michigan Climate Action Network For Leave to Appeal October 23, 2020 Ruling Excluding Evidence.

INTRODUCTION

Since Enbridge filed with the Commission an application pursuant to 1929 PA; MCL 483.1 *et seq.* ("Act 16") in April to construct a massive tunnel under the Straits of Mackinac and route a pipeline through it ("Project"), Enbridge has repeatedly sought to limit the Commission's review of the proposed Project. First, Enbridge asked the Commission to issue a declaratory ruling that would allow Enbridge to bypass the Commission's entire approval process. The Commission rejected this request in its June 30, 2020 order.

Then, in response to the petitions to intervene filed by the Tribal Nations who were ultimately granted the right to intervene in this matter, Enbridge filed objections in which it argued that the tribes should be granted permissive intervention but should be limited with

respect to the issues they could address in the contested case. The ALJ granted the tribes intervention by right without the restrictions requested by Enbridge.

Most recently, Enbridge filed a motion in limine in which it again sought to limit the evidence that the parties could proffer in this case. In an order dated October 23, 2020, the ALJ granted, in part, and denied, in part, Enbridge's motion.

Bay Mills respectfully requests the Commission to reverse the ALJ's decision to exclude from the contested case (1) evidence regarding the operational aspects, including the public need and safety, of the entirety of Line 5, and (2) evidence pertaining to the environmental effects of greenhouse gas emissions and climate change.

The ALJ's decision must be reversed because: (1) Bay Mills has a right to submit evidence on the risks presented by Line 5 pursuant to the Administrative Procedures Act ("APA"), Act 16, and the Michigan Environmental Protection Act ("MEPA"); (2) the State of Michigan's obligation to preserve and protect the Tribal Nations' treaty rights in the region requires a consideration of the myriad ways in which Line 5 and the proposed tunnel could impact those rights; (3) evidence regarding the public's need for this project is necessary to the Commission's Act 16 analysis; and (4) evidence concerning greenhouse gas emissions and climate change is directly relevant to the Commission's obligation to evaluate environmental impacts under Act 16 and MEPA.

Before making a decision of such consequence to the Great Lakes and the people of the State of Michigan, the Commission should have a complete and full record. If Enbridge is serious about its commitment to reducing the threat to the Great Lakes, it should welcome a full hearing to evaluate the risks presented by Line 5 so that it can address concerns before

extending the life of Line 5 for several more decades. Bay Mills respectfully submits that the Commission permit all of the evidence that the parties seek to submit on the matter.

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Rule 433 of the Commission's Rules of Practice and Procedure, R 792.10433, Bay Mills submits this Application for Leave to Appeal the October 23, 2020 Ruling of ALJ Dennis W. Mack granting in part, and denying in part, Enbridge's Motion in Limine ("ALJ's Ruling" or the "Ruling"). Rule 433 provides that, during the course of a proceeding, a party may appeal an ALJ's ruling to the Commission.[1] This rule sets forth the criteria used by the Commission when reviewing an Application for Leave to Appeal:

> The commission will grant an application and review the presiding officer's ruling if any of the following provisions apply: (a) A decision on the ruling before submission of the full case to the commission for final decision will materially advance a timely resolution of the proceeding. (b) A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public at large. (c) A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order.[2]

The Commission should grant Bay Mills' Application because by doing so, the Commission: (i) will materially advance a timely resolution of the proceeding, and (ii) will prevent substantial harm to Bay Mills and other Tribal Nation parties.

The Ruling failed to address the bases upon which Bay Mills opposed Enbridge's Motion in Limine. If the Ruling stands, Bay Mills will be deprived the opportunity to pursue discovery about and present evidence necessary to the Commission's MEPA and Act 16 analyses, including, but not limited to, issues of whether there is a reasonable and prudent alternative to

[1] Mich Admin Code R 792.10433.
[2] Mich Admin Code R 792.10433(2).

the Project, the risks posed by the Project and therefore whether it meets safety standards, and the public need for the Project. Further, Bay Mills may be deprived of the opportunity to present evidence of how the Project threatens their Treaty-protected rights.

PROCEDURAL HISTORY

On April 17, 2020, Enbridge filed an application, pursuant to Act 16 and Michigan Administrative Code, R 792.10447 ("Rule 447"), requesting approval to replace and relocate the segment of Line 5 crossing the Straits of Mackinac into a tunnel to be constructed beneath the Straits of Mackinac (the "Line 5 Project" or the "Project"). As part of its application, Enbridge requested a declaratory ruling that its application did not need to proceed through the Commission's approval process because, according to Enbridge, it already had the requisite authority for the Line 5 Project based on the Commission's grant of authority for the construction of the Line 5 pipeline in 1953.

In its application, Enbridge stated that the purpose of the Line 5 Project is to alleviate an environmental concern to the Great Lakes."[3] In support of this statement and its application, Enbridge submitted, *inter alia*, the Pre-Filed Direct Testimony of Amber Pastoor, the manager responsible for the Line 5 Project, who testifies that the Project would eliminate the risk of an oil spill.[4] Enbridge also submitted the Pre-Filed Testimony of Marlon Samuel, the director responsible for management of customer supply, who testifies that there is demand for Line 5 and Enbridge intends to operate Line 5 well into the future after the completion of the Project.[5]

[3] Enbridge Application, at 1, ¶2.
[4] Pre-Filed Testimony of Amber Pastoor at 3-4, 14-15.
[5] Pre-Filed Testimony of Samuel Marlon, at 5.

On May 11, 2020, Bay Mills filed its Petition to Intervene, with supporting affidavits, in which it described Bay Mills' treaty-protected rights and resources in and around the Straits of Mackinac and throughout the territory that Bay Mills and other Tribal Nations had ceded to the United States in 1836 for the creation of the State of Michigan. The Petition stated that these rights and resources, which include the right to fish in the waters in and around the ceded territory, are threatened both by the Line 5 Project *and* the continued operation of Line 5. Specifically, in an affidavit filed in support of the petition, President Bryan Newland stated:

> The operation of current Line 5, and the prospect of siting and construction of a tunnel in the Straits of Mackinac for the transport of petroleum products, is the most obvious and preventable risk to the fishery resources throughout northern Lakes Michigan and Huron.[6]

Shortly after submitting its petition, Bay Mills submitted comments to the Commission in opposition to Enbridge's request for a declaratory ruling.

On June 30, 2020, the Commission denied the declaratory relief requested by Enbridge. The Commission also ordered that this matter proceed as a contested case, specifically citing the impact of Line 5 on the Great Lakes as a rationale for its decision: "Moreover, due to the significant public interest and concern regarding the Line 5 Project's potential environmental impact on the Great Lakes, the Commission finds that it is in the public interest to conduct a contested case proceeding."[7]

On August 13, 2020, the ALJ issued an order granting the Petition to Intervene of Bay Mills, among others, and setting a briefing schedule for the parties to file motions in limine to limit the scope of the contested case, as well as a schedule for other filings. Enbridge filed such

[6] Affidavit, President Bryan Newland, Petition to Intervene, at 4, ¶11.
[7] June 30, 2020 Order, at 69.

a motion on September 2, 2020 ("Enbridge's Motion in Limine" or "Motion in Limine") and responses were filed on September 23, 2020.[8] The ALJ presided over oral arguments on September 30, 2020 and issued a ruling on October 23, 2020. In that ruling, the ALJ denied Enbridge's motion to exclude evidence pertaining to the utility tunnel but granted the motion in other respects. Specifically, the ALJ ruled that "any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issue, is outside the scope of this case."[9] The ALJ further held: "[C]onsistent 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."[10]

Discovery is ongoing. Pursuant to the ALJ's August 13, 2020 Scheduling Order, the filing deadline for testimony of Staff and parties is February 12, 2021. Rebuttal testimony is due April 19, 2021. Motions to Strike and responses thereto are due April 28, 2021 and May 12, 2021, respectively. Cross-examination by all parties and of all testimony is scheduled for May 18 – May 21 and May 24 – May 27, 2021.

[8] Bay Mills, the Grand Traverse Band of Ottawa and Chippewa Indians, the Michigan Environmental Council, Tip of the Mitt Watershed Council and National Wildlife Federation filed a joint response to Enbridge's motion. In that joint response, the parties supported the arguments related to climate change found in the response filed jointly by the Environmental Law & Policy Center and Michigan Climate Action Network. The Attorney General filed a response adopting and incorporating the arguments in both of the joint response briefs.
[9] ALJ's Ruling, at 16.
[10] ALJ's Ruling, at 19.

Bay Mills now seeks leave to appeal and respectfully requests the Commission to reverse those aspects of the ALJ's Ruling excluding evidence about the operational aspects of Line 5 and the environmental effect of greenhouse gas emissions and climate change.

ARGUMENT

I. EVIDENCE OF THE OPERATION AND RISKS OF ALL OF LINE 5 IS NECESSARY FOR THE COMMISSION'S ACT 16 AND MEPA ANALYSES.

Evidence regarding the risk of an oil spill from Line 5 into the Great Lakes and the Straits—from the segment of the pipeline that runs through the Straits *and* elsewhere on Line 5—is relevant to this proceeding. Enbridge has submitted evidence on these issues, and, under the APA, Bay Mills has the right to confront, rebut and refute that evidence with evidence of its own. Permitting Bay Mills to offer evidence about the oil spill risks associated with Line 5 is also consistent with the Commission's broad authority under Act 16 and the comprehensive environmental analysis required under MEPA. Furthermore, as explained in Section II, *infra*, Bay Mills' Treaty-protected rights require the Commission to consider evidence of the Line 5 Project's impacts on Treaty-protected resources throughout the ceded territories, including the Straits. The ALJ's Ruling, however, would prevent Bay Mills from conducting discovery and presenting evidence on these issues because the Ruling broadly excludes evidence "regarding the operational aspects, including the public need and safety, of the entirety of Line 5," and pipeline safety encompasses oil spill risks.[11]

[11] ALJ's Ruling, at 19. The Ruling combined discussion of "public need" and "safety." *See id.*, at 10-16. These are two distinct but related issues – the Commission, for example, lists them as separate Act 16 factors – which could include different evidence. For the purposes of this appeal, Bay Mills addresses "public need" in Section III, *infra*.

A. To Determine Whether The Project Will Alleviate The Risk Of An Oil Spill From Line 5, The Commission Must Consider The Dual Pipelines In The Straits As Well As The Other Portions Of The Line 5 Pipeline.

Pursuant to the Michigan APA, Bay Mills must be permitted to rebut and present evidence on central issues in the case. Specifically, under the APA, "[t]he parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and arguments on issues of fact."[12] Furthermore, "[a] party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for the use of the agency and offered into evidence."[13] As part of the right to challenge testimony and evidence, "[a] party may submit rebuttal evidence."[14] Indeed, the right to present witnesses, evidence and argument and to confront adverse witnesses and evidence is part of the "rudimentary due process" that is required in administrative proceedings.[15] Thus, if Enbridge submits evidence on a legal or factual issue in this case, then Bay Mills must be provided the opportunity to confront that evidence and to present its own evidence on that issue.

Enbridge has submitted evidence on a central issue in this case—whether the Line 5 Project will alleviate the risk of an oil spill from Line 5 into the Great Lakes. This issue is presented prominently in Enbridge's application to the Commission which states: "The purpose of the Project is to alleviate an environmental concern to the Great Lakes raised by the State of Michigan relating to the approximate four miles of Enbridge's Line 5 that currently crosses the

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[12] MCL 24.272(3).
[13] MCL 24.272(4).
[14] *Id.*
[15] *See, e.g., Sponick v.City of Detroit Police Dept.*, 49 Mich App 162, 188 (1973) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

Straits of Mackinac ("Straits")."[16] In support of this statement, Enbridge submitted the Pre-Filed Direct Testimony of Amber Pastoor, the Manager responsible for the Project. After describing the purpose of the Project,[17] Ms. Pastoor repeatedly states that the tunnel would eliminate the risk of an oil spill. Referencing the "Second Agreement" that Enbridge entered into with the State of Michigan on October 4, 2018, she states that the tunnel "would essentially eliminate the risk of adverse impacts that may result from a potential oil spill in the Straits."[18] Then, she notes that, as reflected in Enbridge's "Third Agreement" with the State of Michigan, "the Tunnel is expected to eliminate the risk of a potential release from Line 5 into the Straits."[19] Simply put, Enbridge has placed the risk of an oil spill into the Great Lakes front and center in this case. Alleviating that risk is the rationale Enbridge offers for the Project and Enbridge is encouraging the Commission to approve its application because, according to Enbridge, the Project will accomplish the stated objective.

The ALJ's Ruling on the Motion in Limine deprives Bay Mills of the ability to present and challenge evidence as provided by the APA because it prohibits Bay Mills from offering evidence on a central issue in the case – namely, whether the Project will, as Enbridge asserts, "essentially eliminate" the risk of an oils spill to the Great Lakes. If the purpose of the Line 5 Project is to address the significant risk of a catastrophic oil spill, then all of the risks along the length of Line 5 must be evaluated to determine whether the tunnel will actually achieve its stated purpose. A spill in another part of the pipeline can reach or harm the Straits and or Great

[16] Enbridge Application, at 1, ¶2.
[17] Pre-Filed Direct Testimony of Amber Pastoor, at 3-4.
[18] *Id.*, at 14-15.
[19] *Id.*, at 15.

Lakes because of the hydrological connections of waterways that Line 5 crosses in the region. Consider, for example, that the spill from Enbridge's Line 6 that damaged the Kalamazoo River was a spill into a tributary, the Talmadge Creek.[20] In Minnesota, a court of appeals deemed the risk of an oil spill reaching Lake Superior from Enbridge's planned Line 3, which does not cross Lake Superior, to be an essential part of the environmental analysis of Line 3.[21] Here, it would make little sense—and would not serve the public—to construct a tunnel to alleviate the risk of an oil spill from one segment of Line 5 if the same or similar risks are left unaddressed throughout the pipeline's length.

The Commission also cannot ignore the fact that the Line 5 Project will take at least 5 years to complete and will perpetuate the risk to the Straits and the area's tribal resources.[22] The risk of an oil spill from the deteriorating, 67-year old pipeline is significant. An assessment of the risks associated with the Line 5 Project necessarily depends on an assessment of the existing threats.

By barring evidence regarding the safety of the entirety of Line 5, the Ruling creates a proceeding in which Enbridge's assertions about how the Line 5 Project would alleviate risk would essentially be accepted as true without any critical examination. Such a result is unfair and contrary to the requirement of the APA. Bay Mills respectfully submits that due process requires that the Ruling be reversed to allow Bay Mills to offer evidence to rebut Enbridge's claim that the tunnel will essentially eliminate the risk of an oil spill in the Straits. Such evidence

[20] *See* Joseph Riesterer, The Enduring Legacy of the 2010 Kalamazoo River Oil Spill, BELT MAGAZINE (July 12, 2019) https://beltmag.com/kalamazoo-river-line-6b-oil-spill/.
[21] *In re Enbridge Energy, Ltd. P'ship,* 930 N W 2d 12, 17 (Minn Ct App 2019).
[22] *See* Exhibit A-9, at 5.

may include testimony and exhibits that demonstrate: Line 5 crosses over 290 rivers and streams, many of which are interconnected and flow to the Great Lakes and the Straits; there has been a long history of leaks across the length of Line 5; there is a real and substantial risk of a catastrophic spill along segments of Line 5 that would not be relocated in the tunnel; Enbridge has a troubling record with detecting, responding to, and cleaning up leaks; and a spill from Line 5 would have devastating consequences on the lives and livelihoods of the members of Bay Mills.[23] Evidence could also include testimony and exhibits about the harms to fisheries and spawning grounds, threatened and endangered species, wetlands, floodplains, groundwater, the shoreline, or cultural resources and antiquities as a result of an oil spill from the dual pipelines in the Straits or along other portions of Line 5.[24] The APA and basic notions of fairness require that Bay Mills be permitted to develop and present this evidence. Otherwise, the

[23] Rule 433's requirement that an appealing party submit an offer of proof in connection with an appeal of a ruling excluding evidence, Mich Admin Code R 792.10433(3), is not applicable because the ALJ did not exclude particular evidence, but instead excluded entire topics or categories from consideration in the case. That particular requirement specifies, "the offer of proof shall be made on the hearing record." *Id.* Such a hearing record does not exist; the hearing is scheduled for May 2021. And, the parties are in the midst of discovery and still developing their respective cases. Nevertheless, to assist the Commission in its consideration of this request for leave to appeal, Bay Mills provides descriptions of evidence that they would seek to introduce. Consistent with the deadlines for filing testimony set by the ALJ, Bay Mills is in the process of developing testimony to describe the risks the Line 5 Project poses to Bay Mills members and their interests in fisheries and other resources. The witnesses who can and will provide this testimony include, among others, the tribal members who provided affidavits attached to Bay Mills Petition to Intervene. Bay Mills also incorporate by reference the offers of proof made in the Application for Leave to Appeal the Administrative Law Judge's Ruling on Motion in Limine by Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, and National Wildlife Federation.

[24] Antiquities are well documented in the Region. *See e.g.*, John M. O'Shea and Guy A. Meadows, "Evidence for early hunters beneath the Great Lakes"*; see generally, Charles E. Cleland, Rites of Conquest: The History and Culture of Michigan's Native Americans.* (University of Michigan Press) (1992); John Halsey, ed., Retrieving Michigan's Buried Past (Cranbrook Institute of Science) (1999).

Commission will be denied critical information needed to determine whether Enbridge should be permitted to proceed with the Line 5 Project.

B. Commission Precedent Supports A Broad Review Of Risks Related To The Project.

Commission precedent supports a broad review of the route, feasibility, environmental impacts, and risks related to the Line 5 Project.[25] In this case, that should include an evaluation of the risks posed by Line 5 in its entirety. Act 16 confers broad authority on the Commission and the Commission has historically used this authority to review a wide range of potential risks and environmental consequences in Act 16 proceedings, most notably in the *In re Wolverine* cases.[26] In *Wolverine 1,* the Commission reviewed two segments of a proposed petroleum products pipeline. One of the pipeline segments was proposed to run within the same corridor as an existing 8-inch pipeline owned by Wolverine, and was generally agreed to be an improvement over that existing line.[27] A portion of that corridor ran through a densely populated area between I-96 and I-69.[28] Staff provided testimony on a broad range of potential risks associated with that portion of the segment:

> . . . Wolverine's decision to place its new line in such a densely developed area needlessly "increases the risk of third party damage" and heightens the potential for "significant adverse impacts if an accident occurs." Among the issues that the Staff felt Wolverine failed to adequately address was the effect that this section of the proposed pipeline system could have on (1) Meridian Township's water

[25] *See In re Enbridge Energy Ltd P'ship*, Case No. U-17020, January 31, 2013, Order, at 5 (specifying the Commission's criteria for approving an Act 16 application); *In re Wolverine Pipe Line Company*, Case No. U-12334, Order dated March 7, 2001, 2001 WL 306697 (*Wolverine 1*) and *In re Wolverine Pipe Line Company*, Case No. U-13225, Final Order dated July 23, 2002, 2002 WL 31057451 (*Wolverine 2*) (assessing numerous risks associated with a proposed project in an Act 16 proceeding).

[26] *Wolverine 1*; *Wolverine 2*.

[27] *Wolverine 1 at *2.*

[28] *Id* at *3.

> wells and those of other nearby property owners, (2) the Ingham County Medical Care Facility and various other senior living facilities that are located in close proximity to the line's route, (3) the Township's water treatment facility, part of which sits directly above the line's proposed path, (4) the Okemos shopping district, including the Meridian Mall, through which the route would pass, (5) schools and public safety offices located adjacent to the proposed pipeline, and (6) apartment complexes through which the line would run.[29]

In light of those concerns, Staff recommended that the Commission deny Wolverine's application.[30] The ALJ agreed, reasoning that "Act 16 grants the Commission broad powers and authority to regulate the proposed pipeline, including the ability to address public interest and public safety concerns raised by Wolverine's proposal."[31] The ALJ also found that "although much of the project would constitute 'an upgrade from the existing 8-inch pipeline' and that its construction 'would have only minimal impact' on the environment, the risks inherent in routing the 12-inch line through the densely developed area between I-96 and I-69 overshadowed the system's potential benefit."[32]

Wolverine withdrew its application for the segment between the two freeways, but took exception to the ALJ's recommendations concerning the scope of the Commission's authority. The Commission rejected that exception and held that it "has broad jurisdiction over the construction and operation of pipeline systems like that proposed by Wolverine. Inherent in that jurisdiction is the power to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest."[33] Later, in *Wolverine 2*, the Commission again reviewed a broad range of potential environmental risks including: the risks of pipeline failure;

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[29] *Id*
[30] *Id*
[31] *Id* at *4 (citing PFD at 8).
[32] *Id* (citing PFD at 10).
[33] *Id* at *6.

the risk to homes; the risk to motorists; the safety devices and design features of the line; the risk of explosion; the risk of groundwater contamination; and racial and demographic inequities associated with the route selection.[34] Thus, as reflected in the *Wolverine* cases, a broad review of the risks associated with a project is consistent with the Commission's prior practice.

The Commission should reject the ALJ's contrary conclusion. The ALJ dismissed the applicability of the *Wolverine* cases, concluding that a fair reading of them suggests that the Commission applied the Act 16 standards to the portion of the pipeline proposed to be replaced.[35] Such an interpretation is inconsistent with the Commission's recognition in the *Wolverine* cases of its broad authority under Act 16 and the MEPA and APA considerations at issue here. The Commission's broad authority, coupled with the fact that Enbridge itself has offered testimony about the risk of an oil spill from Line 5, compels the conclusion that Bay Mills must be afforded the opportunity to offer evidence of its own.

Enbridge has placed the risk of an oil spill into the Great Lakes at the center of this case and it urges the Commission to approve the Project because it will alleviate that risk. To determine whether Enbridge has met its burden under Act 16, the Commission must make an evaluation of whether the Project will achieve its intended purpose. Such an evaluation cannot ignore potential impacts to the Great Lakes, an issue that the Commission specifically cited as a reason for granting this contested case. In order to adequately scrutinize potential impacts to the Great Lakes, the Commission must assess the spill risk throughout the pipeline's length. The

[34] *Wolverine 2* at *8-15.
[35] ALJ Ruling, at 15, n 8.

Commission should allow Bay Mills and other parties the opportunity to conduct discovery and offer evidence regarding these risks.

C. The Commission's MEPA Obligations Also Require An Analysis Of The Environmental Risk Posed By Line 5.

MEPA similarly requires a review of risks related to the Line 5 Project, including spill risks along the length of the pipeline and the dual pipelines. Although the ALJ's Ruling recognizes that a MEPA analysis is necessary to this case and includes the construction of the tunnel,[36] the Ruling ignores how the MEPA analysis must also include the continued operation of Line 5. The Ruling does not acknowledge MEPA in its analysis of whether "operational aspects, including the public need and safety of, the entirety of Line 5" are within the scope of this proceeding.[37] That is an error.

MEPA requires a broad review of all alleged environmental effects of a project. Section 5(2) of that statute provides:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.[38]

The Michigan Supreme Court has held that state agencies are obligated to consider whether their actions are likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust therein. Moreover, MEPA does not "merely provide a separate Procedural route for protection of environmental quality, it also is a source of *supplementary*

[36] ALJ Ruling at 17.
[37] ALJ Ruling at 10-16.
[38] MCL 324.1705(2) (emphasis added).

substantive environmental law."[39] Additionally, while Bay Mills does not disagree that the Commission may seek the input of other agencies such as EGLE and the Army Corps of Engineers, such input does not relieve the Commission of its obligation to conduct its own analysis of the Project's environmental impacts.

Here, the Commission must consider the environmental effects stemming from the entirety of the conduct outlined in Enbridge's direct testimony and exhibits in the MEPA analysis in order to fully understand the environmental impacts of Enbridge's proposal. Consistent with the Commission's obligation under MEPA, Bay Mills and other parties should be able to rebut and put forth evidence on the issue of whether or not the Project will in fact reduce or eliminate the risk of an oil spill, as suggested by Enbridge.[40] A thorough examination of the adverse impacts that may result from a potential oil spill posed by the dual pipelines during the construction of the Line 5 Project and the ongoing risks along the length of Line 5 is necessary for such an analysis. For example, if by conducting discovery and introducing evidence, Bay Mills shows that Enbridge will operate Line 5 in its current condition for 8 to 10 years if it does not undertake the Project, but will operate it for 80 years if the Project is completed, then it is common sense to consider an additional 70+ years of Line 5 operation as an effect of the conduct at issue in this proceeding. In addition, Bay Mills should be afforded the opportunity to present evidence relating to the potential environmental impacts of the Project's plan to operate the dual pipelines until tunnel construction is complete.

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[39] *Michigan State Hwy Comm v Vanderkloot*, 392 Mich 159, 184 (1974); *see also Mich. Oil v. Natural Resources Commission*, 406 Mich 1, 32-33 (Mich 1979) (holding that "[t]he environmental protection act, by its terms, is substantively supplementary to existing laws and administrative and regulatory procedures provided by law.").

[40] Pre-Filed Direct Testimony of Amber Pastoor at 14-15.

Critically, MEPA also requires agencies to consider the existence of feasible and prudent alternatives.[41] Indeed, "an examination of alternatives that avoid or limit the impact to a resource is a hallmark of Michigan environmental law."[42] Alternatives analyses traditionally begin with an evaluation of the project's purpose.[43] As discussed in Section I.A, *supra*, Enbridge has stated a purpose of reducing the environmental risks associated with an oil spill to the Great Lakes as the Line 5 Project's purpose.[44] Therefore, evidence must be developed and presented with regard to the risk of oil spills to the Great Lakes from Line 5 when it is operating in the dual pipelines during tunnel construction, when it is operating in the tunnel (including from lengths of the pipeline outside of the tunnel), as well as if Line 5 followed a different route or if the existing pipeline operated for a shorter duration than it will if the Project is allowed and constructed.

Bay Mills and other parties must be able to conduct discovery and submit evidence on the issue of whether this Project alleviates risk of impact to the Great Lakes, as Enbridge states, and whether there is an alternative that could achieve that goal, so that the Commission may have a full and complete record for conducting its MEPA analysis.

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[41] MCL 324.1705(2); *see also Michigan State Hwy Comm v Vanderkloot*, 392 Mich 159, 183-85, 220 NW2d 416 (1974); *Buggs v. Michigan Pub. Serv. Comm'n*, No. 315058, 2015 WL 159795, at *7 (Mich Ct App Jan 13, 2015).

[42] *Petition of Dune Harbor Estates, LLC*, 2005 WL 3451406, at *5 n 8 (Mich Dept Nat Res Dec 7, 2005).

[43] *See, e.g.*, Mich Admin Code R 281.922a(4) (defining how a Michigan environmental agency begins its alternatives analysis); 40 CFR 230.10(a)(2) (setting out the steps for an alternatives analysis of a federally-permitted project).

[44] Application at 1, ¶2.

D. The Pipeline Safety Act Does Not Preempt The Commission's Evaluation Of The Risks Posed By Line 5.

Enbridge, in its Motion in Limine, argued that the Pipeline Safety Act ("PSA") preempts the Commission's jurisdiction under Act 16.[45] The ALJ's Ruling did not reach this issue in considering the motion.[46] However, to the extent Enbridge continues to pursue this issue before the Commission, this argument must be rejected because it is divorced from the plain text of the PSA and inappropriately attempts to diminish the Commission's authority. Federal preemption of state law may be express or implied. Express preemption must be stated by Congress in explicit language.[47] Implied preemption includes field preemption[48] or conflict preemption.[49] In its Motion in Limine, Enbridge raised express preemption based on the language of the PSA.[50]

The PSA authorizes the Pipeline Hazardous Materials Safety Administration[51] ("PHMSA"), as part of the Department of Transportation, to "prescribe *minimum* safety standards for pipeline transportation and for pipeline facilities."[52] As Enbridge stated, the PSA

[45] Enbridge Motion in Limine at 14-15.
[46] ALJ Ruling at 15, n 9.
[47] *Lorillard Tobacco Co. v. Reilly*, 533 US 525, 541 (2001). Preemption is rooted in the Supremacy Clause of the U.S. Constitution. U.S. Const. Art. VI, cl. 2.
[48] *Arizona v. United States*, 567 US 387, 399 (2012).
[49] *Id*.
[50] Enbridge did not raise field preemption, likely because courts have ruled that the PSA does not occupy the field of natural gas siting. *See Washington Gas Light Co. v. Prince George's County Council*, 711 F3d 412, 422 (4th Cir. 2013). Enbridge also did not raise conflict preemption, but it is worth noting that the Commission's jurisdiction here would not thwart the purposes of the PSA because PHSMA's responsibilities do not include addressing the need for or environmental impacts of the proposed tunnel project.
[51] 49 C.F.R. § 1.97
[52] 49 U.S.C. § 60102(a)(2).

provides, "State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."[53]

However, in its Motion in Limine, Enbridge omitted another relevant provision, Section 60104(e), which states that the PSA "does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility."[54] The PSA leaves the regulation of location and routing to state and local governments; under Section 60104(e), states retain authority "to prohibit pipelines altogether in certain locations."[55] Therefore, the PSA does not preempt the siting authority granted to the Commission under Act 16, but rather explicitly acknowledges it.[56] Furthermore, because the PSA does not cover environmental risk posed by pipeline location and routing, the Commission clearly has a role in addressing such risks when exercising its Act 16 authority. Indeed, the Commission may prohibit the siting of Line 5 in the Straits if it determines that the location or routing is unreasonable.

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[53] 49 U.S.C. § 60104(c) (emphasis added). The PSA also gives "certified states" the authority to impose more safety standards on intrastate pipelines, demonstrating the limited scope of preemption.

[54] 49 U.S.C. § 60104(e).

[55] *Portland Pipe Line Corp. v. City of S. Portland*, 288 F Supp 3d 321, 430 (D. Me. 2017). In Portland Pipe Line Corp., the court provides an apt analogy by explaining that while the federal fuel economy standards preempt state of local law regulation of fuel economy standards for automobiles, the federal standard does not preempt where cars may be parked, where they can travel, or whether cars are allowed.

[56] Bay Mills also points the Commission to the Staff's explanation of the additional roles that the Commission plays, as an agent for PHMSA, in overseeing pipelines: "While Staff agrees with Enbridge that PHMSA has jurisdiction over the safety of hazardous liquids pipelines, the Commission acts as PHMSA's agent in fulfilling this role for gas pipelines. The Commission acts under an agreement with PHMSA as described in USC 49 § 60117 for the inspection of interstate gas pipelines. Additionally, the Commission acts as a certified agent for PHMSA as described in USC 49 § 60105 for intrastate gas pipelines and has a certain measure of authority over plaintiff's operations notwithstanding that they involve interstate commerce. *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 42 (1954)." Staff Response to Enbridge's Motion in Limine at 16, footnote 7.

Enbridge's claim that the PSA preempts the Commission's authority is not supported by the cases it cited. Those cases are inapplicable because they do not involve an assessment of the appropriateness of an activity altogether—e.g., the evaluation of the need for, location of, and environmental threats posed by a proposed pipeline project. Instead, every case Enbridge cited involves the enforcement of state safety standards[57] for pipeline operations that have already been approved. *See Olympic Pipe Line Co. v. Seattle*, 437 F3d 872, 880 (9th Cir. 2006) (holding that the PSA preempted the City of Seattle from enforcing its own more stringent pipeline safety provisions against an existing pipeline); *Kinley Corp. v. Iowa Utilities Board*, 999 F2d 354, 358 (8th Cir. 1993) (concluding that PSA preempted a state law designed to regulate safety of an existing project); *Williams Pipe Line Co. v. City of Mounds View*, 651 F Supp 551, 566 (D. Minn. 1987) (determining that it would be inconsistent with the PSA's goal of pipeline safety if every individual landowner could demand compliance with their own safety standards). Further, by stating that the purpose of the Project was to reduce the existing pipelines' environmental threat to the Great Lakes, Enbridge made it necessary for the Commission to evaluate the risks associated with the (1) location and routing of the proposal, and (2) the ongoing operation of the Line 5 dual pipelines pending the tunnel's construction. If preemption applied here in the way that Enbridge claimed, the Commission would relinquish all power to consider the environmental impacts in analyzing proposed projects, even if the projects potentially threatened public trust or Tribal treaty rights and resources.

[57] Although "standards" is not defined in the PSA, "standard" means "criterion for measuring acceptability, quality, or accuracy." Portland Pipe Corp., 288 F Supp 3d at 429 (quoting Black's Law Dictionary (10th ed. 2014).

Courts have consistently held that the scope of PSA's preemption is limited. *See Washington Gas Light Co. v. Prince George's Cty Council*, 711 F3d 412, 420–21 (4th Cir. 2013) (holding that a zoning plan was not preempted by the PSA); *Texas Midstream Gas Servs, LLC v. City of Grand Prairie*, 608 F.3d 200, 210–211 (5th Cir. 2010) (holding that a setback requirement for a compressor station was not preempted by the PSA because it was not a safety standard); *Enbridge Energy v. Town of Lima*, 2013 WL 12109106 (W.D. Wis. 2013) (concluding that local road use demands are not safety regulations preempted by the PSA); *Portland Pipe Line Corp.*, 288 F. Supp. 3d 321, 429 (D. Me. 2017) (holding that an ordinance "prohibiting loading crude oil onto tankers and new structures" in a harbor was not preempted by the PSA because it was not a safety standard); *Davis v Sunoco Pipeline Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2020 (Docket No. 346729), at 6 (holding that rule prohibiting air contaminants or water vapor and nuisance rule not preempted by PSA).

Because the Commission's review of Enbridge's Line 5 Project under Act 16 and MEPA are not safety standards covered by Section 60104(c), they are not preempted by the PSA. Though the Commission's decisions may reflect considerations of safety and environmental risk, overlapping safety concerns are insufficient to transform the Commission's authority under Act 16 into a safety standard.[58]

II. THE COMMISSION MUST CONSIDER EVIDENCE OF THE LINE 5 PROJECT'S IMPACTS ON TREATY-PROTECTED RESOURCES THROUGHOUT THE CEDED TERRITORIES, INCLUDING THE STRAITS.

The scope of the contested case must include full consideration of the impacts of the Line 5 Project on treaty-protected resources, including the impacts of operation of the dual

[58] *See Portland Pipe Line Corp.*, 288 F Supp 3d at 434.

pipelines until tunnel construction is complete and the ongoing risks the pipeline poses in the ceded territories along the length of Line 5. In the 1836 Treaty of Washington ("1836 Treaty"), Bay Mills and other Tribal Nations reserved a right to fish, hunt, and gather in the ceded territory, including in the Straits of Mackinac and the Great Lakes. The Line 5 Project threatens these treaty protected property and usufructuary rights.[59] The ALJ's Ruling improperly narrows the scope in a way that precludes Bay Mills, a party to the contested case, the opportunity to present evidence related to the threats to the Treaty-protected resources and engage in meaningful consultation with the Commission. For instance, Bay Mills would submit evidence about the consequences of a potential oil spill from the dual pipelines in the Straits—and the continued spills into waterways that are hydrologically connected to the Great Lakes—on plants, fisheries, and cultural resources in the Straits and the Great Lakes relied on by Bay Mills.

A. The 1836 Treaty Is The Supreme Law Of The Land And Rights Reserved By Bay Mills Must Be Honored And Protected By The Commission.

The 1836 Treaty is the supreme law of the land.[60] Bay Mills is a successor to the signatories to the 1836 Treaty,[61] which ceded territory to the United States for the creation of the State of Michigan. Through this Treaty, the Tribal Nation signatories reserved to themselves the right to hunt, fish, and gather throughout the ceded lands and waters, including the right of

[59] *See United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) *aff'd* 653 F.2d 277 (6th Cir. 1981), *cert denied*, 454 U.S. 1124 (1981); *Grand Traverse Band of Chippewa & Ottawa Indians v. Dir., Michigan Dep't of Nat. Res.,* 971 F. Supp. 282, 288-89 (W.D. Mich. 1995), *aff'd sub nom. Grand Traverse Band of Ottawa & Chippewa Indians v. Dir. Michigan Dep't of Nat. Res.*, 141 F.3d 635 (6th Cir. 1998).

[60] U.S. Const., Art. VI.

[61] Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians are collectively referenced as "the 1836 Treaty Tribes."

commercial and subsistence fishing in the Great Lakes. These treaty rights have been confirmed by state and federal courts and continue to be utilized to this day.[62]

As with any treaty with another sovereign nation, only the United States Congress can abrogate a treaty.[63] And, it is clear that treaty rights are guaranteed not only against the United States, but also against the states, and their grantees.[64] In the many cases in which it has considered tribal treaty protected fishing rights, the United States Supreme Court has taken an expansive view of the nature of treaty rights.[65] Courts have also held that the fishing right also requires the preservation of the supply of fish[66] and the protection of fish habitat.[67]

The "Culverts Case," one of the many sub-proceedings in the *United States v. Washington*[68] litigation, is particularly instructive here. Several tribes, joined by the United States, sued the State of Washington, asserting that the State of Washington had a duty under the treaties to preserve anadromous fish runs and their habitat. The claims specifically

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[62] *See People v LeBlanc*, 248 NW 2d 199 (Mich 1976); *United States v. Michigan*, 471 F Supp 192 (W.D. Mich. 1979) *aff'd* 653 F.2d 277 (6th Cir 1981), *cert denied*, 454 U.S. 1124 (1981); *Grand Traverse Band of Chippewa & Ottawa Indians v. Dir., Michigan Dep't of Nat. Res.,* 971 F Supp 282, 288-89 (WD Mich 1995), *aff'd sub nom. Grand Traverse Band of Ottawa & Chippewa Indians v. Dir. Michigan Dep't of Nat. Res.*, 141 F.3d 635 (6th Cir 1998).

[63] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172, 202 (1999); *Menominee Tribe of Indians v US*, 391 US 404, at 411 n 12 (1968).

[64] *Winans*, 198 US at 381-382; *United States v. Washington,* 853 F3d 946 (9th Cir 2017)

[65] Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment Affirming the Right to Habitat*, 92 Wash U Law Rev 1 (2017); *see also U.S. v. Winans*, 198 US 371, 381-82 (1905) (upholding the Tribal Nations right of access over private land to fish in the Columbia River); *Choctaw Nation v. U.S.*, 119 US 1, 30 (1886); *Seufort Bros Co v. U.S.*, 249 US 194, 197-98 (1919).

[66] *Washington v. Commercial Fishing Vessel Ass'n*, 443 US 658, 696-97 (1979).

[67] *United States v. Washington*, 2007 WL 2437166, *10 (W.D. Wash. 2007), *aff'd U.S. v. Washington*, 853 F3d 946 (9th Cir. 2016) (treaty-protected fishing rights "would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource.").

[68] *United States v. Washington*, 20 F Supp 3d 986, 1023 (W.D. Wash. 2013).

challenged state-owned culverts located under State roads that obstructed fish passage; the culverts' obstruction of fish passage diminished the supply of fish. The tribes argued that the State's actions violated the treaty-protected right to fish. The Court agreed and ruled that the State violated its duty owed to the tribes under the treaties.[69] As was the case in Culverts and the other cases noted above, federal and state government agencies are bound to honor and protect tribal treaty rights.

B. Bay Mills Does Not Seek To Expand The Commission's Act 16 Jurisdiction, But Rather Seek A Proper Consideration Of The Tunnel Project's Impacts On Tribal Treaty Rights And Resources.

The ALJ's Ruling reflects a misunderstanding of the role of Treaty rights in this contested case proceeding. The Ruling stated the Treaty rights and right to consultation "cannot, standing alone, be a basis to expand the Commission's jurisdiction under Act. 16." Bay Mills did not argue that the Treaty rights should expand the Commission's Act 16 jurisdiction. Rather, as described above in Section I.C, the Commission must consider the environmental effects that the project with have on the natural resources, many of which are also Treaty-protected resources, in order to fully understand the Project's impacts.[70] Further, the 1836 Treaty and the subsequent agreements between the federal government, the State, and the Tribal Nations

[69] *United States v. Washington*, 853 F3d 946 (9th Cir 2017), aff'd by *Washington v. United States*, 138 S Ct 1832 (2018).
[70] *Nemeth v. Abonmarche Dev., Inc.*, 457 Mich. 16, 34, 576 N.W.2d 641, 650 (1998) (there is a responsibility to independently determine the existence of "likely pollution, impairment, or destruction.").

independently require protection of tribal resources.[71] Evidence of the impacts on Treaty-protected resources is critical for the Commission to ensure that the State of Michigan is fulfilling its obligations under the 1836 Treaty.[72]

In this instance, when evaluating Enbridge's permit application, the Commission must consider the impacts that the Line 5 Project will have on the fishing, hunting, and gathering rights of the 1836 Treaty Tribes. Indeed, in *U.S. v. Michigan*, the court recognized the tribal fishing rights under the 1836 Treaty when it rejected the notion that the State of Michigan could regulate tribal fishing in the same manner that it regulates other Michigan citizens. Ultimately, as a result of that case, the State of Michigan and the 1836 Treaty Tribes entered into a consent decree in 1985 regarding management of the Great Lakes fishery.[73] That agreement affirmed the State's obligation to work with the Tribal Nations to preserve the Tribal Nations' treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. The Tribal Nations and the State have worked together to protect the Great Lakes ever since.

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[71] The Treaty of March 28, 1836, 7 Stat. 491. *See also* Consent Decree, *United States v. Michigan,* Case No. 2:73-cv-26 (W.D. Mich. Aug. 7, 2000) (regarding the Great Lakes); Consent Decree, *United States v. Michigan,* Case No. 2:73-cv-26 (W.D. Mich. Nov. 2, 2007) (regarding inland lands, rivers, and streams).

[72] *See Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F Supp 1515, 1520 (W.D. Wash. 1996); *Muckleshoot Indian Tribe v. Hall*, 698 F Supp 1504, 1512-16 (W.D. Wash. 1988); cf. *Environmental Justice: Guidance Under the National Environmental Policy Act*, 14, 9 (Dec. 10, 1997) ("[w]here environments of Indian tribes may be affected, agencies must consider pertinent *treaty*, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship").

[73] 12 Indian Law Reporter 3079 (August 1985). In 2000, the federal government, the State of Michigan, and the 1836 Treaty Tribes negotiated a successor agreement to regulate tribal fishing activities in the Great Lakes.

In addition, Enbridge's and the ALJ's Ruling reliance on the 1953 approval of Line 5 as a basis for limiting the scope of this proceeding is misplaced. As explained by Bay Mills in its response to Enbridge's Request for a Rehearing of the Commission's June 30 Order, the 1836 Treaty Tribes' rights are antecedent and superior to any rights Enbridge may have.[74] And to Bay Mills' knowledge, no state or federal agency has considered the impact of Line 5 on the Tribes treaty rights and resources; the mistake cannot be made again today.

Considering the State's commitment to protect the fisheries and the requirements of MEPA, the contested case process must involve the presentation of evidence related to the environmental threats associated with the current dual pipelines to the fisheries in the area of the Straits and the other threats posed by Line 5 to 1836 Treaty waters.

C. The Ruling's Exclusion Of Evidence Thwarts The Purpose Of The Government-To-Government Consultation.

A decision by the Commission to approve the Line 5 Project affects Bay Mills' and other Tribal Nations' interests and, therefore, the Commission Staff must consult with Bay Mills and the other affected Tribal Nations. Meaningful consultation is guaranteed by 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (the "2002 Accord") and Executive Directive No. 2019-17. Bay Mills has the legal right to engage in government-to-government consultation with the Commission's Staff about the Project as required by the 2002 Accord and most recently directed by Governor Whitmer through the issuance of Executive Directive No. 2019-17. The

[74] *United States v. Michigan*, 471 F Supp 192, 256 (WD Mich 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir 1981) (tribes reserved fishing rights in waters of Great Lakes, because treaty reserved their aboriginal rights to fish in those waters); *see also State v. Coffee*, 556 P.2d 1185, 1188 (Idaho 1976) ("hunting and fishing rights are part and parcel with aboriginal title").

2002 Accord defines consultation as "a process of government-to-government dialogue between the state and the tribes regarding actions or proposed actions that significantly affect or may significantly affect the governmental interests of the other."[75] The 2002 Accord sets out the requirements for consultation to include:

> (1) timely notification of the action or proposed action, (2) informing the other government of the potential impact of the action or proposed action on the interests of that government, (3) **the opportunity for the other government to provide input and recommendations on proposed actions to the governmental officials responsible for the final decision**, and (4) the right to be advised of the rejections (and basis for any such rejections) of recommendations on proposed actions by the governmental officials responsible for the final decision.[76]

The Executive Directive requires that:

> Each department and agency must adopt and implement a process for consulting on a government-to-government basis with Michigan's federally recognized Indian tribes. The department or agency must engage in this consultation process before taking an action or implementing a decision that may affect one or more of these tribes.[77]

The Executive Directive then sets forth in detail the framework and requirements of the consultation process.

Recognizing its obligations under the 2002 Accord and the Executive Directive, Commission Staff have begun the consultation process with Bay Mills and other Tribal Nations. Limiting the scope of the contested case process in a way that prevents the introduction of evidence related to the threat to tribal resources posed by the Line 5 Project runs contrary to the requirements of consultation as set out above and in the 2002 Accord and Executive Directive. What is the point of Consultation if it cannot influence the outcome?

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[75] 2002 Accord at 3.
[76] *Id*. (emphasis added)
[77] Executive Directive at 2 (emphasis added).

Enbridge previously argued that granting its request for relief would not deprive the Tribal Nations their right to consultation because "the tribes will continue to have an opportunity to consult with the state and the federal government and shape the outcome regarding the tunnel through numerous permitting activities that remain."[78] Enbridge's assertion that the Commission need not fulfill its consultation obligations because other agencies will, is wrong; the Executive Directive is clear: *Every* state department or agency must engage in the consultation process before taking an action or implementing a decision that affects the tribes.[79]

III. EVIDENCE OF THE PUBLIC NEED FOR THE FUELS TO BE TRANSPORTED BY THE LINE 5 PROJECT IS NECESSARY FOR THE COMMISSION'S ACT 16 ANALYSIS.

To grant an Act 16 application, the Commission must find that "the applicant has demonstrated a public need for the proposed pipeline."[80] The ALJ's Ruling, however, would exclude from this case "any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues."[81] The ALJ's Ruling appropriately rejected Enbridge's position that any analysis of the public need for the Project should be excluded because of determinations made in the 1950s—saying that those determinations "do not end the inquiry." However, the ALJ's Ruling still ends the inquiry too soon by excluding evidence about the future need for Line 5. Continuing to operate Line 5 into the future is both Enbridge's purpose for the Project and the effect of the Project. Thus, the need for the continued operation of Line 5 persists into the future. If the ALJ's Ruling stands,

[78] *See* June 30 Order at 24 (discussion of Enbridge's reply comments).
[79] Executive Directive at 2.
[80] *In re Enbridge Energy, Ltd. P'ship,* Case No. U-17020, Final Order dated January 31, 2013, at 5.
[81] ALJ Ruling at 16.

Bay Mills and other parties will not be able to present critical evidence on whether there is a need for the Line 5 Project.

A. The 1953 Orders And Easement Do Not Control The Commission's Public Need Analysis In This Proceeding.

In moving to exclude evidence regarding the public need for the continued operation of Line 5, Enbridge argued that the determination of need was "conclusively established" in two 1953 Commission orders and *Lakehead Pipe Line Co. v. Dehn*, 340 Mich 25 (1954).[82] Staff mistakenly agreed with Enbridge's position.[83] Aside from the obvious differences in the world and what the public needs between the present and the early 1950s,[84] there are two critical errors in relying on those authorities.

First, as discussed in Section II.C, *supra*, Bay Mills was not consulted in 1953 or at any point during the construction of this oil pipeline through the ceded territories. Bay Mills' relationships to the resources in the ceded territories for fishing, hunting, gathering, as well as for medicines and ceremonies, date back to time immemorial, and the federal government guaranteed Bay Mills' rights to these resources in the 1836 Treaty.[85]

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[82] Enbridge Motion in Limine at 4, 13.

[83] Staff Response at 14-15.

[84] The Straits themselves are different, for example. The Mackinac Bridge was not opened until 1957. In 1953 the "need" for ferry service between Michigan's peninsulas was different then as compared to now, when people can drive across the bridge. Moreover, the alternative methods of transporting fuels across the Straits and through the region, which the Commission must consider as part of its MEPA analysis, MCL 324.1705(2), looks different than today with trucks as an option. *See* Enbridge, Alternatives for Replacing Enbridge's Dual Pipelines Crossing the Straits of Mackinac (2018).

[85] Recent executive actions regarding consultation, such as the 2002 Accord and Executive Directive 2019-17, recognized the importance of government-to-government communication and formalized processes for that communication. Commendable as those actions are, the value in and fairness of hearing from Bay Mills in decision-making processes that could affect its

Second, the 1953 orders and 1954 opinion relate to a project that is significantly different from the present Line 5 Project. The ALJ's Ruling correctly notes that the 1953 orders and *Lakehead Pipe Line Co.* do not "end the inquiry" on public need.[86] Indeed, the Commission already has found that "it is evident that the Line 5 Project differs significantly from what was approved in the 1953 orders," and that "Enbridge does not have the requisite authority to construct the Line 5 Project pursuant to the 1953 orders."[87] Because this is a new Act 16 application, the Commission will need to make a new determination of all Act 16 factors, including public need.[88]

A closer look at *Lakehead Pipe Line Co.* reveals that it is not determinative either. There, the issue was whether it was necessary for the state to allow the pipeline company "to acquire by condemnation the right-of-way across land in Bay County," which is different in scale and scope than the issue before the Commission in this proceeding—namely, a new Act 16 application to extend the life of Line 5 by constructing a concrete tunnel to route a pipeline beneath the Straits.[89] Nothing in *Lakehead Pipe Line* can reasonably construed as preventing or limiting the critical examination of public need that the Commission must do under Act 16.

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treaty-protected resources predates the 2002 Accord and Executive Directive 2019-17. Bay Mills' cultural, spiritual, and economic interests in these resources predates the pipeline, the State of Michigan, and the 1836 Treaty.

[86] ALJ Ruling at 16. The Ruling also says that the prior approval of Line 5 goes to the public need for the instant Project. *Id.* Bay Mills disagrees with relying on the prior approval as persuasive authority.

[87] June 30 Order at 58.

[88] Similarly, Act 359, MCL 254.324a, *et seq.*, does not control the public need determination. Act 359 "creates the [Mackinac Straits] Corridor Authority . . . and authorizes the Corridor Authority to operate the utility tunnel." *Enbridge Energy, LP v. State*, 2020 WL 3106841, No. 351366 at *4 (Mich App June 11, 2020). It did not, however, revise or revoke Act 16 in any way; Act 359 did not displace the Commission's Act 16 public need analysis. *See* ALJ Ruling at 10.

[89] *Compare Lakehead Pipe Line Co.*, 340 Mich at 27, *with* June 30 Order at 58.

Ultimately, as the Commission reasoned in its order denying Enbridge's request for a declaratory ruling, "Enbridge does not have the requisite authority to construct the Line 5 Project pursuant to the 1953 orders, the 1953 easement, or the 1953 easement amendment."[90]

B. Because The Line 5 Project Would Secure Line 5's Continued Operation For Decades, The Commission Must Evaluate The Economic Need For The Pipeline's Continued Operation.

The Commission must assess whether there is a public need for Enbridge to continue to operate Line 5 because that is the purpose and effect of the Project. Enbridge itself has made the continued operation of Line 5 an issue in this case.

First, Enbridge has placed the issue of continued operation of Line 5 and the longevity of the pipeline at issue in this case, and other parties must be permitted to present evidence on the issue and challenge Enbridge's evidence. As discussed in Section I.A, *supra*, under the APA, "[t]he parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and arguments on issues of fact."[91] Also, "[a] party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for the use of the agency and offered into evidence. A party may submit rebuttal evidence."[92] In its direct case, Enbridge has presented issues of fact regarding the operation of Line 5 in the future, ensuring that the topic of the continued need for the operation of Line 5 is within the scope of this case based on its application and the evidence it has introduced.

[90] June 30 Order at 58.
[91] MCL 24.272(3).
[92] MCL 24.272(4).

Enbridge's application materials state that the Line 5 Project includes a lease that will entitle Enbridge to occupy the area for another 99 years.[93] In the testimony filed with its application, Enbridge states its intent to continue to use Line 5 "well into the future after the completion of the Project" because it "expect[s]" the utilization of Line 5 of the past ten years to continue.[94] At the earliest and subject to permit approvals, Enbridge seeks to *begin* operating the Line 5 through the tunnel in 2024.[95] At that point, the Line 5 Project will unquestionably be part of the length of Line 5 through which fuels are transported. Other parties must have an opportunity to challenge Enbridge's expectation that the public will need to transport fuels through Line 5 well into the future.[96] Thus, the questions of whether there is a public need for Line 5 in 2024, "well into the future," and in 99 years are squarely at issue in this case.

In response, Enbridge may claim that Line 5 will continue whether the Project is built or the dual pipelines stay in the water. The Commission should not bind itself to Enbridge's false choice. The continued operation of the dual pipelines cannot be assumed and it is far from certain that the dual pipelines would remain in place but for the construction of the tunnel. First, there is active litigation seeking the decommissioning of the pipeline; in June 2020, the Ingham County Court issued a temporary restraining order requiring the shutdown of the dual

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[93] Enbridge Application, Exhibit A-5 at 34, Section 5.3. Enbridge also states in its application that the Project will cost $500 million, which begs the question of why a company would invest that much money in infrastructure if it did not plan to use it for many years. Enbridge Application, Exhibit A-9 at 14.

[94] Pre-filed Testimony of Marlon Samuel at 5.

[95] State of Michigan, Line 5 in Michigan, https://www.michigan.gov/line5/0,9833,7-413-99949-528646--,00.html; *see also* Exhibit A-9, at 5 (stating a project timeline of "5 to 6 years" to construct the tunnel alternative).

[96] MCL 24.272(4).

pipelines in the Straits, explaining that "the severe risk of harm" from an oil spill was "so substantial and irreparable, and endangers so many communities and livelihoods and the natural resources of Michigan, the danger far exceeds the risk of financial loss to the defendants."[97] Second, Governor Whitmer requested that the Michigan Department of Natural Resources review Enbridge's compliance with its easement requirements, noting that "[p]ossible violations of the easement are just one of several grounds by which the state could seek to shut down the pipelines."[98] Third, when the Commission and the Department of Environment, Great Lakes, and Energy undertake its MEPA analysis, if it determines that the Line 5 project will impair or pollute natural resources, they will need to consider feasible alternatives; these alternative analyses could result in the identification of a feasible alternative to the tunnel and/or the existing dual pipelines. Fourth, there is a common-sense question of whether Enbridge would plan to spend $500 million dollars on construction of a tunnel (as stated in its application materials) and years in permitting and building processes, if it could continue to operate under the status quo model.[99] Enbridge's assumption that Line 5 will continue to operate through the Straits regardless of whether this Project is approved is unproven and is itself the proper subject of discovery and the development of evidence and

[97] Temporary Restraining Order, *Nessel v. Enbridge Energy*, *LP*, *et al*, No. 19-474-CE (Ingham County Cir Ct Michigan, June 25, 2020); *see also* Brief in Support of Motion for Preliminary Injunction; and Motion For a Temporary Restraining Order, *Nessel v. Enbridge Energy*, *LP*, *et al*, No. 19-474-CE (Ingham County Cir Ct Michigan). Note that while the Court subsequently allowed the west line of the dual pipelines to open temporarily for investigation purposes, it has not yet ruled on the pending preliminary injunction motion.

[98] *See* MEC-GTB-BMIC-TOMWC-NWF Response to Motion in Limine, Exhibit 7 at 2.

[99] Enbridge Application, Exhibit A-9 at 14. Additionally, Enbridge presented alternatives to the Project, none of which called for doing nothing and leaving the dual pipelines in the water. Pre-filed testimony of Amber Pastoor at 15-16.

testimony in this case.[100] Commission precedent also supports the consideration of a broad scope of evidence for a public need assessment. The Commission does not look exclusively to the private interests of the applicant or to the present needs of the applicant's customers for the transported product.[101] For example, when considering Enbridge's request to replace segments of Line 6B, the Commission considered current and future energy requirements of Michigan residents and the frequency of disruptions to landowners and local communities, as well as the interests of "the general public."[102] Here, the parties should be able to refute Enbridge's statement of public interests and benefits with evidence that may aid the Commission in ensuring that the public need assessment really is about the public's needs, not just Enbridge's private interests.[103]

Because securing Line 5's continued operation for decades to come is both the purpose and effect of the Project, the Commission must evaluate whether there is a public need for such

[100] *See* Section I.C., *supra* (regarding discovery that could be taken on the length of the pipeline's operation).

[101] The Commission's broad view of public need is consistent with other state agencies that review need for oil pipelines. For example, in assessing need, Minnesota's utilities commission considers long-range energy forecasts, energy conservation programs, and "the policies, rules, and regulations of other state and federal agencies and local governments," among other things. Minn Stat 216B.243(3).

[102] *In re Enbridge Energy Limited Partnership*, Case No. U-17020, Final Order dated January 31, 2013, at 22.

[103] For example, Enbridge asserts that a benefit of the Project is the "fact" that it has "committed to utilizing Indigenous Peoples' services for at least 10 percent of the total operating, engineering, and labor staff-hours worked." Pre-filed Testimony of Amber Pastoor, at 12. The 1836 Treaty Tribes retain reserved rights to fish, hunt, and gather in the Project area and many other tribes and tribal members continue to use the fishery for recreational, subsistence, and commercial purposes. Enbridge proposes that a non-binding commitment to temporarily utilize Indigenous Peoples' services—for a Project that may cause significant and permanent harm to treaty-reserved rights—justifies the Project. Bay Mills must have an opportunity to present testimony in response to this proposition.

a long-term commitment. Enbridge assumes that there is, but the parties must be permitted to challenge Enbridge's evidence and counter it with their own.

C. The Commission's Public Need Analysis Must Include A Consideration Of How The Project Relates To Michigan's Public Health, Clean Energy, And Decarbonization Goals.

An assessment of public need requires a broad analysis, including a consideration of what is necessary for public health, the economy, and the pursuit of Michigan's energy goals.

The ALJ's Ruling would exclude from this case evidence on Michigan's public interest and needs related to energy as recently articulated by the Governor.[104] Governor Whitmer's Executive Order 2020-182 and Executive Directive 2020-10 set out a plan for a healthy climate. These actions show an executive assessment of the public need to move away from fossil fuels and the public need to avoid some of the worst harms of climate change by reducing greenhouse gas emissions. Because the fuels transported by the Project contribute to greenhouse gas emissions, as explained in Section IV, how this Project relates to the state's healthy climate goals is relevant to public need.

There is ample support for considering Michigan's climate objectives as part of a public need analysis. First, Commission precedent supports a broad definition of "public need,"[105] and the Governor's articulation of the state's needs certainly qualifies. Second, Enbridge would have the Commission consider a prior Governor's actions, which would also bring the present Governor's relevant actions into the ambit of the case.[106] Third, other states have explicitly

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[104] Enbridge relies on actions of a previous Governor to argue that there is a public need for this Project. To the extent that actions of the state government are relevant to determinations of public need for this Project, Enbridge cannot cherry pick actions.

[105] *See* Section III.B.

[106] *See, e.g.*, Exhibit A-8.

incorporated state and federal policies[107] and state "climate objectives"[108] into determinations of whether proposed pipeline projects are needed.

As stated in Executive Directive 2020-10: "[W]e must build a carbon-neutral state. Carbon-neutrality is needed not only for the environment and public health, but also for the resilience of our economy." The stated purpose of the Executive Directive's goals is twofold. First, the purpose is to "avoid some of the worst harms" of climate change, which "already degrades Michigan's environment, hurts our economy, and threatens the health and well-being of our residents, with communities of color and low-income Michiganders suffering the most." In other words, Michigan recognizes that greenhouse gas emissions already hurt the public. Second, the purpose is to "eliminate [the state's] dependence on out of state fossil fuels" and generate jobs for Michigan's workforce in other energy sectors. For the Commission to determine the "public need" for this Project, evidence must be permitted on how the Project, which would transport fossil fuels from out of state, relates to Michigan's public need to eliminate dependence on out of state fossil fuels and their downstream impacts on the health and well-being of Michigan residents.

Executive Directive 2020-10 includes a commitment to reducing greenhouse gas emissions by 2025 and achieving carbon neutrality by 2050. Not only is this a statement of the public need to reduce emissions—and, in turn, reduce reliance on the very fuels to be transported by the Project—on a much shorter timescale than the lifetime of the proposed

[107] Minn Stat 216B.243(3).
[108] *See In the Matter of the Application of San Diego Gas & Elec. Co. (U902g) & S. California Gas Co. (U904g) for A Certificate of Convenience & Necessity for the Pipeline Safety & Reliability Project.*, No. 15-09-013, 2018 WL 3304539, at *21 (June 21, 2018).

Project with its 99-year lease, but it is a statement of the need to reduce emissions by the time the Project could become operable.[109]

Ignoring the downstream environmental and public health impacts of this Project and Line 5 is at odds with other actions Michigan's government, including the Commission, is taking.[110] The exclusion of downstream effects of "climate change" would do just that. Here, parties must be permitted to present evidence and arguments about how this project relates to public health, downstream environmental impacts, and the State's transition to a clean energy economy. Evidence on these subjects may be of the type discussed in the response briefs filed by Environmental Law & Policy Center ("ELPC") and Michigan Climate Action Network ("MICAN") and For Love of Water ("FLOW"),[111] as well as how climate change will impact the treaty-protected resources, such as tribal fisheries.

IV. AS PART OF ITS MEPA ANALYSIS, THE COMMISSION MUST CONSIDER HOW THE LINE 5 PROJECT CONTRIBUTES TO POLLUTION FROM GREENHOUSE GASES.

If approved, the Line 5 Project will perpetuate Michigan's reliance on fossil fuels contrary to the Governor's directives, and the environmental impacts of those fuels must be considered as part of the Commission's MEPA analysis.

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[109] State of Michigan, Line 5 in Michigan, https://www.michigan.gov/line5/0,9833,7-413-99949-528646--,00.html; *see also* Exhibit A-9, at 5 (stating a project timeline of "5 to 6 years" to construct the tunnel alternative).

[110] It is also at odds with the teaching of the Anishinaabe people, which includes Bay Mills, that says the decisions we make today should result in a sustainable world seven generations into the future. *See* Section IV, *infra*.

[111] The Environmental Law & Policy Center's and Michigan Climate Action Network's Opposition to Enbridge Limited Partnership's Motion in Limine ("ELPC/MICAN Response") (Sept 23, 2020); Response to Enbridge Energy, Limited Partnership's Motion in Limine by For Love of Water (Sept 23, 2020).

As ELPC and MICAN articulated in their response brief, which Bay Mills, the Attorney General, and other environmental and tribal parties incorporated,[112] the Commission must address environmental impacts of the proposed Project as required under MEPA, which requires the Commission to determine whether there is "pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in those resources."[113] The Project will transport fuels so that they can be refined for petroleum products, including gasoline and aviation fuels,[114] which emit greenhouse gases when combusted.[115] Greenhouse gas emissions contribute to "pollution, impairment, or destruction" of natural resources.[116] Thus, the greenhouse gas emissions that will result from fuels transported by the Project must be considered in a MEPA analysis.

The ALJ's Ruling incorrectly concluded that the Commission lacks jurisdiction over greenhouse gas emissions resulting from the fuels that will be shipped on Line 5 by attempting to analogize this situation to the Commission's reasoning in an order approving natural gas pipeline application. In that case, the Commission concluded that it lacked authority to consider potential impairment to the environment caused by "possible future gas well development" that the pipeline might "bait."[117] The Line 5 Project is distinguishable based on the likelihood of the impacts. In the natural gas case, there was a suggestion of the possibility of new wells being

[112] MEC-GTB-BMIC-TOMWC-NWF Response to Motion in Limine at 40; ELPC/MICAN Response; Attorney General's Response to Enbridge Energy Limited Partnership's Motion in Limine (Sept 23, 2020).
[113] MCL 324.1705(2); *State Hwy Comm v. Vanderkloot*, 392 Mich 159, 185 (1974).
[114] Pre-filed Testimony of Marlon Samuel at 4.
[115] *See* ELPC/MICAN Response at 1-2.
[116] *Massachusetts v. E.P.A.,* 549 US 497, 532 (2007) (recognizing that "greenhouse gases fit well within the Clean Air Act's . . . definition of 'air pollutant'").
[117] Case Nos. U-17195/U-17196, September 23, 2015 Order, at 7.

constructed as a result of the proposed pipeline. Here, there is certainty: if the Line 5 Project is approved and the tunnel built, fossil fuels will be transported through the pipeline and then combusted, emitting greenhouse gases. Additionally, the ALJ's Ruling did not grapple with the statutory interpretation argument or cases cited by ELPC and MICAN and incorporated by Bay Mills.

Foreseeable greenhouse gas emissions are a typical consideration in environmental impact analyses. Federal courts often require foreseeable emissions from a project to be addressed, including emissions from the downstream use of oil and gas that will result from the project.[118] State agencies also consider foreseeable greenhouse gas emissions when assessing the route of a pipeline project. For example, while Enbridge pursues re-routing of Line 5 under the Straits in Michigan, Enbridge also seeks to re-route Line 5 in Wisconsin. Under the Wisconsin statute that is analogous to MEPA, Wisconsin's permitting agency plans to review "Greenhouse Gas Emissions – Climate Change."[119]

[118] *San Juan Citizens All. v. United States Bureau of Land Mgmt.*, 326 F Supp 3d 1227, 1244 (D.N.M. 2018) (holding that the agency's "failure to estimate the amount of greenhouse gas emissions which will result from the consumption of the oil and gas produced as a result of development of wells on the leased areas was arbitrary"); *WildEarth Guardians v. Zinke*, 368 F Supp 3d 41 (D.D.C. 2019) (holding that the agency's failure to quantify greenhouse gas emissions that were reasonably foreseeable effects of oil and gas development on public land was arbitrary and capricious).

[119] Wisconsin Department of Natural Resources, Environmental Impact Statement on the Proposed Relocation of Enbridge Line 5 Pipeline: Draft Outline, at 2, https://dnr.wi.gov/topic/EIA/documents/Enbridge/EnbridgeLine5_DraftEISOutline.pdf; *see also* Wisconsin Department of Natural Resources, Enbridge Projects in Wisconsin, https://dnr.wisconsin.gov/topic/EIA/Enbridge.html (providing a link to the Draft Outline and dating it June 8, 2020).

Moreover, the Line 5 Project exacerbates the harms of climate change that already threaten tribal resources,[120] by committing to the transport and use of fossil fuels for generations to come. The Anishinaabe people, which includes Bay Mills, have a teaching that says the decisions we make today should result in a sustainable world seven generations into the future. It is a reminder that the consequences of decisions we make today should not be limited to immediate concerns, but instead take into account implications long after we are gone. Accordingly, Bay Mills seeks the opportunity to present climate-related evidence in the contested case process so that it can show the long-term threat posed by the approval of Enbridge's permit.

REQUEST FOR RELIEF

For all of the reasons stated herein, Bay Mills respectfully requests the Commission reverse the ALJ's Ruling (1) granting Enbridge's Motion in Limine "regarding the operational aspects, including the public need and safety of, the entirety of Line 5," and (2) granting Enbridge's motion "as it pertains to the review of the project under MEPA does not entail the environmental effects of greenhouse gas emissions and climate change."

Respectfully Submitted,

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[120] Affidavit, President Bryan Newland, Petition to Intervene at 4, ¶11.

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of Enbridge Energy, Limited Partnership 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	U-20763 ALJ Dennis Mack

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PROOF OF SERVICE

On the date below, an electronic copy of **Application for Leave to Appeal the Administrative Law Judge's Ruling on Motion in Limine by Bay Mills Indian Community** was served on the following:

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The statements above are true to the best of my knowledge, information and belief.

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Date: November 6, 2020

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