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March 23, 2021

Ms. Lisa Felice, Executive Secretary
Michigan Public Service Commission
7109 W. Saginaw Hwy.
Lansing, MI 48917

RE: MPSC Docket No. U-20763

Dear Ms. Felice:

Attached for filing in the above-referenced matter, please find **Applicant Enbridge Energy, Limited Partnership's Response to the Applications for Leave to Appeal on Remand Filed by For Love Of Water, Environmental Law & Policy Center, Michigan Climate Action Network, Bay Mills Indian Community, Grand Traverse Band Of Ottawa And Chippewa Indians, Little Traverse Bay Band Of Odawa Indians, Nottawaseppi Huron Band Of The Potawatomi, Michigan Environmental Council, Tip Of The Mitt Watershed Council, and National Wildlife Federation** and Certificate of Service of same.

Thank you.

Very truly yours,

Fraser Trebilcock Davis & Dunlap, P.C.

Michael S. Ashton

Michael S. Ashton
Digitally signed by Michael S. Ashton
Date: 2021.03.23 14:53:34 -04'00'

MSA/ab
Attachments
cc: All counsel of record

STATE OF MICHIGAN

BEFORE

THE MICHIGAN PUBLIC SERVICE COMMISSION

IN RE ENBRIDGE ENERGY, LIMITED PARTNERSHIP	)	
	)	**Case No. U-20763**
Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 *et seq.* and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief	)	

APPLICANT ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S RESPONSE TO THE APPLICATIONS FOR LEAVE TO APPEAL ON REMAND FILED BY FOR LOVE OF WATER, ENVIRONMENTAL LAW & POLICY CENTER, MICHIGAN CLIMATE ACTION NETWORK, BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, MICHIGAN ENVIRONMENTAL COUNCIL, TIP OF THE MITT WATERSHED COUNCIL, AND NATIONAL WILDLIFE FEDERATION

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I. INTRODUCTION

Enbridge Energy, Limited Partnership ("Enbridge") submits this response to all the applications for leave to appeal on remand filed by opposing interveners[1] from the comprehensive, February 23, 2021 ruling issued by Administrative Law Judge Dennis Mack ("Remand Ruling").[2] Judge Mack properly concluded that the Governor and the Director of the Michigan Department of Natural Resources ("MDNR")'s purported November 13, 2020 Notice of Revocation and Termination of Easement (the "Notice") does *not* allow for a reexamination of Line 5's need or its operational and safety aspects because this Commission already considered those issues when it approved Line 5's construction in the 1953 Order (Exhibit A-3).[3] Rather, the Notice is relevant only as to the proper review of the *proposed project*: "whether a public need exists to replace the existing dual pipelines on Great Lakes bottomlands in the Straits of Mackinac with a single pipeline in a proposed Utility Tunnel." Remand Ruling, p 21. Accordingly, "[t]he Commission's jurisdiction under Act 16 is over the proposal to relocate the existing pipelines into the Utility Tunnel" and "the environmental impacts *of that conduct*." *Id.* (emphasis added). This proceeding is <u>*not*</u> an "inquiry to include the environmental effects of the operation and safety of Line 5, or those arising from the production, refinement, and consumption of the oil transported on Line 5." *Id.* (emphasis added).

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[1] Given the commonality and overlap of their arguments, Enbridge files just one response to all the applications for leave to appeal on remand, and collectively refers to those filing these applications as the "opposing interveners." These opposing interveners who filed separate applications for leave to appeal on remand are: (1) For Love of Water ("FLOW"); (2) Environmental Law & Policy Center ("ELPC") and Michigan Climate Action Network ("MCAN"); (3) Bay Mills Indian Community ("BMIC"), Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), Little Traverse Bay Band of Odawa Indians ("LTBB"), and Nottawaseppi Huron Band of the Potawatomi ("NHBP"); and (4) Michigan Environmental Council ("MEC"), Tip of the Mitt Watershed Council ("TOMWC") and National Wildlife Federation ("NWF").

[2] Enbridge notes that the Attorney General has not appealed, objected to, or otherwise challenged the Remand Ruling

[3] References to "Exhibits" in this Response refer to the Exhibits attached to Enbridge's Application.

To recap the actual scope of this proceeding, Enbridge's Application requests the authority to replace its current Line 5 Straits crossing — consisting of two, 20-inch diameter pipelines referred to as the "Dual Pipelines" — with a replacement pipe segment to be located within a tunnel beneath the Straits. Enbridge's Application seeks to advance the established public policy of the State of Michigan to better safeguard the Great Lakes by mitigating the perceived environmental risk caused by the current location of the Dual Pipelines on the bottomlands of the Straits. Fulfilling this state policy is the sole purpose for Enbridge's Application.

After an extensive review of the Notice, the many pages of briefing and the hours of oral arguments advanced by the opposing interveners, the Remand Ruling agreed with Staff that the Notice "cannot be used to expand the scope of this case" and "does not change the scope of the Commission's MEPA review of the project at issue." Remand Ruling, pp. 19, 20. The Remand Ruling properly concluded that the Notice did not impact the October 23, 2020 Ruling on Motion *in Limine* (the "Initial Ruling") that properly concluded that, under Act 16, the opposing interveners' effort to raise issues relating to "the operational aspects, including the public need and safety, of the entirety of Line 5" and "the environmental effects of greenhouse gas emissions and climate change" were outside the scope of this proceeding and excluded evidence relating to those issues as being irrelevant.[4] *Id.* at pp. 19-20. The Initial Ruling concluded that the proper scope of the case involves a review of Enbridge's Application to "replace the existing 4-miles of dual pipelines located on the bottomlands" of the Mackinac Straits ("Straits"). *Id.* at p. 14. The Initial Ruling concluded that under Act 16 and past Commission decisions, review is limited to a

[4] In determining the relevancy of evidence, this Commission follows the Michigan Rules of Evidence. *See,* R 792.10427(1). The Michigan Rules of Evidence defines relevant evidence to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Evidence which is not relevant is not admissible." MRE 402.

determination of "whether a public need exists for [this 4-mile replacement], whether it is designed and routed in a reasonable manner, and whether its construction will satisfy applicable safety and engineering standards." *Id.* at p. 15. While excluding greenhouse gas emissions and climate change as outside the scope of this case, the Initial Ruling also found that pursuant to the Michigan Environmental Protection Act ("MEPA"), the case included a review of the environmental impact of the tunnel construction. *Id.* at p. 18.[5]

Enbridge's Application seeks to advance the established public policy of the State of Michigan to better safeguard the Great Lakes by mitigating the perceived environmental risk caused by the current location of the Dual Pipelines on the bottomlands of the Straits.[6] As evidenced by their petitions to intervene and subsequent applications for leave to appeal regarding the Motion *in Limine*, the opposing interveners have no interest in addressing the actual issue presented by Enbridge's Application — protecting the Great Lakes by relocating the Line 5 Straits crossing within a tunnel. Instead, they want to frustrate Michigan's policy choice and litigate irrelevant issues that are far outside the Application's scope. They urge the Commission to deny the Application based on the current or future public need for Line 5 (ignoring the extant finding of a public need for Line 5), the operation and perceived safety of Line 5 at locations outside the

[5] While Enbridge did not seek leave to appeal those portions of the Initial Ruling denying its motion, Enbridge does not waive its rights to later challenge those portions of the Initial Ruling. As set forth in R 792.10433(5), "[a] party's failure to file an application for leave to appeal does not constitute a waiver of the right to challenge any ruling of the presiding officer."

[6] This state policy is unequivocally established through a series of Agreements entered between the State of Michigan and Enbridge. Among other things, the Second Agreement states that the replacement of the Dual Pipelines with a pipe segment within a tunnel "can essentially eliminate the risk of adverse impacts that may result from a potential release from Line 5," and that "this Second Agreement … will protect ecological and natural resources held in trust by the State." (Exhibit A-10 at p. 3.) The Third Agreement requires the Dual Pipelines to be permanently deactivated as soon as practicable once the replacement pipe segment within the tunnel is placed in service. (Exhibit A-1 at p. 7.) The Michigan Legislature ratified this policy with its passage of 2018 PA 359, vesting the Mackinac Straits Corridor Authority with the power to oversee the construction, operation, and maintenance of the tunnel which will house the replacement pipe segment, and to own the tunnel after its completion.

Straits (ignoring that this Application does not concern the operation of Line 5 at those other locations), and climate change (ignoring that granting this Application will not alter consumers' consumption of fossil fuels). All these issues are immaterial to the actual question the Application poses: will the relocation of the Line 5 Straits crossing within a tunnel serve a public purpose by better safeguarding the Great Lakes?[7]

The Initial Ruling, confirmed by the Remand Ruling, properly excluded these extraneous issues and recognized that this case's scope concerns only whether a public need or purpose justifies the relocation of the Line 5 Straits crossing within a tunnel. "[A]ny 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." Initial Ruling at p. 15. Consistent with Staff's recommendation, the Commission should affirm the Initial and Remand Rulings and summarily deny all the applications for leave to appeal.[8]

II. THE NOTICE DOES NOT CHALLENGE OR DISPUTE THE COMMISSION'S PRIOR APPROVAL OF LINE 5 NOR ANY ASPECT OF ENBRIDGE'S APPLICATION

The Notice has no impact on the relief sought in Enbridge's Application or the Commission's jurisdiction over the Application. The Notice purportedly revokes the 1953 Easement for the Dual Pipelines and sets forth various disputed bases for the revocation.[9] The legal

[7]At the outset, it is important to stress that the opposing interveners do not dispute the determinative fact in this case, which is that there is public benefit to deactivating the Dual Pipelines in order to better protect the Great Lakes. (See petitions to intervene of MEC, at ¶9; accord the NWF ¶¶7 and 10; TOMWC, at p. 3, ¶10, ELPC and MCAN at ¶13.) They also maintain this position in their initial application for leave to appeal. (Application for Leave of MEC, GTB, TOMWC, and NWF, at p. 9.)

[8] Enbridge adopts by reference its response filed on November 20, 2021 to the opposing interveners earlier applications for leave to appeal. See, Docket # U-20762-0442.

[9] With respect to the dispute created by the Notice and its eventual resolution, the Remand Ruling states: "As the grantor, the State is well within its rights to deem the easement withdrawn and revoked, just as Enbridge, as the

impact, if any, of the Notice and the timing of any impact on the validity of the 1953 Easement will ultimately be decided by the courts.[10] Currently, the dispute generated by the Notice is the subject of a court directed mediation process.[11]

The Notice does not challenge the Commission's prior approval "to construct, operate and maintain [Line 5] as a common carrier" within Michigan. (Exhibit A-3; March 31, 1953, Opinion and Order, D-3903-53.1, at page 9.) The Notice also does not attempt to revisit the public purpose or need for Line 5 as previously determined.[12] Thus, the prior approval of the need for Line 5 is unimpacted by the Notice.

Critically, the Notice does not even attempt to negate or call into question the concrete steps already taken by the Michigan legislative and executive branches to establish a new easement for the relocation of the Line 5 Straits crossing within a tunnel and its continued operation, which form the very purpose for Enbridge's Application. The Michigan Legislature's enactment Public

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grantee, has the right to dispute that action, with the ultimate determination of the validity of the easement made by a court of competent jurisdiction." *Id.* at pp. 13 -14.

[10] Simultaneous with the issuance of the Notice, the State filed a legal action requesting a declaration that the revocation and termination are valid. The State's complaint acknowledges that there are "actual controversies between the parties" concerning the matters the Notice addresses. *State of Michigan et al, v. Enbridge Energy, Limited Partnership et al*., 20-646-CE (Ingham County Circuit Court). Enbridge promptly removed that action to federal court, based on, among other things, that the action was preempted by federal and international law. 1:20-cv-01142 (W.D. Mich., Judge Janet T. Neff presiding). Enbridge has also filed a separate federal lawsuit that seeks a court order that the Notice violates federal constitutional, statutory and treaty law. *Enbridge Energy, Limited Partnership et al*., *v. Whitmer et al*., 1:20-cv-01141 (W.D. Mich., Judge Janet T. Neff presiding).

[11] See the attached Joint Notice of the Parties Regarding Selection of a Facilitative Mediator in Cases 1:20-cv-01141 and 1:20-cv-01142. Attachment A.

[12] Nor is the notice a proper legal vehicle to do so. Before those issues may be revisited, the procedural requirements and safeguards imposed by Section 92 of the Administrative Procedures Act must be satisfied, and the notice does not comply with those legal requirements. See MCL 24.292(1); MCL 24.205(a); and *Rogers v. Michigan State Board of Cosmetology*, 68 Mich. App. 751; 244 N.W.2d 20 (1976).

Act 359 of 2018 ("Act 359") is unimpacted by the Notice.[13] Act 359 created the Mackinac Straits Corridor Authority ("Corridor Authority") and provided it with a mandate to construct a utility tunnel beneath the Straits, to, among other things, relocate the Line 5 Straits crossing. The Notice does not impact MDNR's grant of the new easement for this utility tunnel, which is to include the Line 5 Straits crossing, or the assignment of that new easement. Exhibit A-6. Finally, the Notice does not impact any of the many agreements entered between Enbridge, the Corridor Authority and the State of Michigan to construct the utility tunnel, relocate the Line 5 Straits crossing within that tunnel, and decommission the Dual Pipelines only after the replacement pipe segment is operational.[14]

In short, the Notice simply initiated an additional round of litigation over the validity of the 1953 Easement and Enbridge's compliance with its terms.[15] In the meantime, Enbridge will continue to operate Line 5, including the Dual Pipelines. The existence of this ongoing dispute generated by the Notice does not alter Enbridge's Application or the Initial Ruling establishing the proper scope of this case.

Further, it merits note that the Commission's December 9 Ruling did not order any change in the evidentiary scope of this proceeding, but merely provided the parties with, "the opportunity to brief the question of" whether and to what extent the Notice should affect the issues to be addressed in this proceeding. The parties and the ALJ have taken that directive seriously and

[13] The Attorney General's previous assertions that Act 359 was unconstitutional were rejected by the Michigan Court of Appeals in *Enbridge Energy. Limited Partnership, v. State of Michigan,* __ Mich. App. ___; ___ N.W.2d __ (2020 WL 3106841, June 11, 2020). No appeal was taken, and this decision is final.

[14] Among these Agreements are the Second Agreement (Exhibit A-10), the Third Agreement (Exhibit A-1), and the Tunnel Agreement (Exhibit A-5).

[15] In 2019, a legal action was brought by the Attorney General challenging the validity of the 1953 Easement, which is still pending. *See Nessel v Enbridge Energy, Limited Partnership, et al.,* 19-474-CE (Ingham County Circuit Court, Judge James S. Jamo, presiding).

thoroughly aired the issues in their briefs and at a lengthy oral argument. The Remand Ruling reflects a legally sound conclusion that the Notice should not affect the initial determination made on Enbridge's Motion *in Limine*. The Commission should affirm.

III. OVERVIEW OF REMAND RULING

A. The Remand Ruling's Act 16 Analysis

The Remand Ruling first summarized the Initial Ruling as holding that, "under Act 16[,] the proper inquiry for a proposal involving a segment of an existing pipeline is on that segment, as opposed to the entire pipeline system." Remand Ruling at p. 13.[16] Therefore, the Initial Ruling concluded that "any evidence concerning the entirety of Line 5 is irrelevant" and this included "consideration of the public need, operational, and safety aspects of Line 5 in its entirety." *Id.*[17] The Remand Ruling then concluded that the Notice could not expand the review of Enbridge's Application to include the public need for Line 5 and the operational and safety aspects of Line 5 in its entirety as a matter of law.

Judge Mack's Remand Ruling properly noted, and the Staff recognized, that the public need for Line 5 had been conclusively determined by the 1953 Order, and that Order constitutes a license which could not be revoked without compliance with Section 92 of the Michigan Administrative Procedures Act ("APA"), MCL 24.292.[18] The Remand Ruling concluded:

> Based on the foregoing, to accept the Notice as requiring a reexamination of the public need of Line 5 under Act 16, along with its operational and safety aspects, would result in a diminishment of its existing license [granted by the 1953 Order] under §92(1) of the APA without providing the procedural due process protections

[16] See also Initial Ruling, at p. 15.

[17] See also Initial Ruling at pp. 15-16.

[18] "To revisit that authorization [for Line 5] based on the Notice implicates fundamental administrative law principles because the authority to operate Line 5 under the 1953 Order is a license under Administrative Procedures Act (APA). MCL 24.205(a)." Remand Ruling at p. 16.

> afforded a licensee. Accordingly, the Notice cannot be used to expand the scope of this case to include an examination or determination of the public need for Line 5, or any aspect of its operation and safety. [*Id.*, at pp. 18-19.]

In explaining that the 1953 Order conclusively determined the public need for Line 5 and provided Enbridge the legal authority to operate Line 5 indefinitely, the Remand Ruling stated:

> [The 1953] Order was issued under the authority of Act 16, and held the pipeline meets a public need and serves a public interest. Id., pgs. 7-10; See also Concurring Opinion, pgs. 1-2. In a separate proceeding involving condemnation for the pipeline, but implicating the Line 5 public need determination, the Supreme Court "specifically noted that, in adopting Act 16, the Legislature 'did not undertake to authorize condemnation proceedings other than for a public use benefitting the people of the State of Michigan. That was the basis for legislative action.'" Case No. U-12344, March 7, 2001, Commission Order, pg. 13, citing *Lakehead Pipeline*, 340 Mich at 37. **Accordingly, the 1953 Order issued under Act 16 establishes that Line 5 serves a public need and is in the public interest. Further, since neither are provided for under Act 16, the 1953 Order does not have an expiration date or require renewal, so the authority to operate Line 5 under its authority remains in effect today**. [*Id.* at pp. 15-16 (emphasis added).]

The Remand Ruling concluded that the Notice could not impair Enbridge's existing license to operate Line 5, and only an appropriate proceeding under the APA could impair Enbridge's rights granted by the 1953 Order.

Finally, the Remand Ruling determined that even if the Notice ultimately resulted in the termination of the 1953 Easement, that termination would have no impact on Enbridge's legal right to operate Line 5 pursuant to the 1953 Order. In other words, the legal rights granted by the 1953 Easement and the 1953 Order are separate and distinct:

> If, as the Attorney General argues, the Notice is given presumptive effect, and absent a court staying or enjoining its effect, then on May 13, 2021, Enbridge can be considered to no longer possess the right under the easement to maintain or operate the dual pipelines.

> **However, that does not extinguish the right to operate Line 5 under the 1953 Order**. If on or after May 13, 2021, the dual pipelines are in fact shut down, and as a result Line 5 is also shut down, the right to operate will, as a matter of law, remain in effect. In fact, as Enbridge and Staff note if the operation of Line 5 ceases for whatever reason, under Act 16 it can be restarted in the future under the existing license without first having to obtain Commission approval. See Enbridge Reply Brief, pg. 15; Staff Reply Brief, pgs. 2, 9; 5 TR 337-338, 400-401. **While the practical effect of the Notice on Line 5 on May 13, 2021, is unknown, its legal effect does not extend to revoking the Act 16 license issued in the 1953 Order or nullifying the public need/public interest determination embodied in that license**. [*Id.* at p. 18 (emphasis added)].

A legal dispute over a single easement along the route of a 645-mile long pipeline does not revoke or call into question the Commission's prior approval of a pipeline granted pursuant to Act 16.[19]

B. The Remand Ruling's MEPA Analysis

With respect to MEPA review, the Remand Ruling agreed with Staff's position and concluded that "[t]he issuance of the Notice does not expand the MEPA inquiry to include the environmental effects of the operation and safety of Line 5, or those arising from the production, refinement, and consumption of the oil transported on Line 5." *Id.* at p. 21. In determining that the Notice did not impact the Commission's review pursuant to MEPA, the Ruling on Remand stated:

> Specifically, as set forth under the Act 16 analysis, the Notice also does not change the authority under which Line 5 operates, and thus the operation and safety of that system is outside the conduct subject to review under MEPA. Further, the Notice does not provide the substantive legal basis … to expand the MEPA review to the environmental effects of the extraction, refinement and ultimate consumption of the oil shipped on Line 5. Under MEPA, the focus is on the conduct under agency review and the statutory authority underlying that review. … For these reasons, the Notice does not

[19] Here, the State of Michigan has already provided a new easement for the Straits crossing, which once operational will accomplish the goal of the Notice — the decommissioning of the Dual Pipelines. (Exhibit A-6.)

> change the scope of the Commission's MEPA review of the project at issue in this case as set forth in the Initial Ruling. [*Id.* at p. 20.]

The Remand Ruling properly concluded that the Notice did not impact the scope of review under either Act 16 or MEPA.

IV. THE MOTION *IN LIMINE* WAS NOT PREMATURELY DETERMINED, AND ENBRIDGE'S APPLICATION DID NOT INVITE OR REQUIRE THE REEXAMINATION OF THE NEED FOR LINE 5

A. The Motion *in Limine* was Properly Decided at the Outset of the Case

Some opposing interveners object to the Initial Ruling and Remand Ruling by asserting that a determination of the case's scope is premature, and that Enbridge is unfairly limiting the evidence that could be presented.[20] See e.g., ELPC at p. 2-3. The opposing interveners argue that the scope of the case should not be decided now and should be decided only after extensive discovery and the preparation of pre-filed testimony, or perhaps even after the evidentiary hearing. *Id.* This argument ignores the fact that the Motion *in Limine* was necessitated by the opposing interveners' attempts to raise a host of irrelevant issues, clearly outside the scope of an Act 16 proceeding. If this were a federal court proceeding involving a constitutional claim, interveners' request would be akin to demanding discovery on tort claims, contract claims, and statutory claims that were not presented nor even within the court's subject-matter jurisdiction.

The actual issues presented in this Act 16 proceeding are straightforward: (1) whether a public need exists for relocating the Straits crossing within a tunnel, (2) whether the replacement pipe segment is designed and routed in a reasonable manner, and (3) whether its construction will satisfy applicable safety and engineering standards. Instead, opposing interveners sought to litigate issues such as: the need for Line 5, the operation and safety of

[20] Other opposing interveners supported an early determination of the scope of the case. *See,* 1 Tr. pp. 23, 56 -57.

Line 5 in its entirety, the impact of greenhouse gases associated with products shipped on Line 5, the Marshall incident along Line 6B, need for fossil fuels given the rise of electric vehicles, the public trust doctrine, and their overall general opposition to the fossil fuel industry.[21]

At the same time that Judge Mack granted their petitions to intervene, he also established a schedule to allow Enbridge to file a Motion *in Limine* to establish the proper scope of this proceeding. Initial Ruling at p. 1. Far from being premature, one of the stated purposes of a prehearing conference is "[d]etermining the scope of the hearing." R 792.10421(1)(d). The motion to determine the scope of the case was properly heard at the outset of this proceeding as called for by the Commission's own rules.

B. Enbridge's Application Fulfills the State Policy of Better Protecting the Great Lakes and Does Not Seek to Extend its Lifespan or Relitigate the Need for Line 5

1. The Sole Purpose of Enbridge's Application is to Fulfill the State Policy of Better Protecting the Great Lakes

The opposing interveners go to great lengths to selectively quote from Enbridge's Application, supporting testimony, and exhibits to confuse and misconstrue the nature of Enbridge's Application in an effort to expand the case's scope. They argue that Enbridge's Application is nothing more than a "Trojan Horse" to extend the life of Line 5 for 99 years and suggest that it is actually Enbridge, for some unexplained reason, that seeks to relitigate the already conclusively determined need for Line 5. See e.g., BMIC at p. 19 – 20 and MEC at p. 13. These arguments ignore that any fair reading of Enbridge's Application establishes that its sole purpose is to further the State of Michigan's established public policy to relocate the Line 5 Straits crossing within a tunnel to better protect the Great Lakes.

[21] See e.g., ELPC and MCAN petition at pp. 6 -7 ¶¶12 and 13; NWF petition at pp. 2-3 ¶7, MEC petition at p. 3 ¶9; TOMWC p. 3 ¶10; FLOW petition at p. 3 ¶4 and p.6 ¶10; BMIC petition at p. 3, ¶12; LTBB petition at p. 3 ¶¶ 8 - 9; NHBP petition at p. 2 ¶6; and GTB petition at p. 4, ¶12.

As plainly stated in Enbridge's Application, "[t]he 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 Straits." Application ¶2. Relocating the Line 5 Straits crossing within a tunnel "virtually eliminates the already very small risk of a release from Line 5 impacting the Straits." Application ¶30.[22] "This Project will allow for the discontinuation of service on the Dual Pipelines upon placing in service the replacement pipe segment within the tunnel." Application ¶4.

As extensively set forth in the Application, there is no dispute that it is the State's policy to relocate the Line 5 Straits crossing within a tunnel. In November 2017, the State of Michigan and Enbridge entered into the First Agreement where "Enbridge agreed to conduct an evaluation of alternatives to replace the Dual Pipelines." Application ¶25, Exhibit A-8. "Enbridge and the State of Michigan also agreed (at Stipulation I.H) to initiate discussions following the completion of Enbridge's alternatives evaluation to enter into a further agreement concerning the operation of the Dual Pipelines." *Id*. "Enbridge [then] submitted the completed alternatives analysis to the State of Michigan on June 15, 2018, which is Exhibit A-9." *Id.,* at ¶26. "Enbridge's alternatives analysis concluded that construction of a tunnel beneath the lakebed of the Straits … and the installation of a replacement pipe segment within the tunnel, was a feasible alternative to the Dual Pipelines, and that this alternative would essentially eliminate the risk of a potential release in the Straits." *Id.* Based on this analysis, Enbridge and the State entered into the Second Agreement where Enbridge and the State of Michigan agreed to 'promptly pursue further

[22] "The possibility of an anchor strike causing a release will be entirely eliminated, and there will be multiple layers of protection, including the pipeline, the tunnel—including its concrete liner—and approximately 60 feet to 250 feet of earth between the tunnel and the lakebed of the Straits. These layers protect the Straits against the remote possibility of a release caused by another event." Application ¶30.

agreements' concerning the construction and operation of a tunnel to replace the Dual Pipelines." Application at ¶27, quoting Exhibit A-10 at pp 5 – 6.

In accordance with Act 359,[23] Enbridge and the Corridor Authority then "entered into the Tunnel Agreement (Exhibit A-5)" in which the Corridor Authority agreed to acquire from the MDNR an easement issued by MDNR expressly for the tunnel. Application at ¶29 and Exhibit A-5, at ¶3.1(a). At the same time as entering the Tunnel Agreement, "Enbridge also entered into the Third Agreement (Exhibit A-1)" which at Paragraph 4.2(c), recognizes that the replacement of the Dual Pipelines with the Straits Line 5 Replacement Segment in the Tunnel is expected to eliminate the risk of a potential release from Line 5 into the Straits." Application at ¶29. Thus, the sole purpose of Enbridge's Application is to obtain approval to relocate the Line 5 Straits crossing into a tunnel in order to eliminate perceived risks to the Great Lakes, which will fulfill the State's policy to alleviate a perceive threat to the Great Lakes - - as envisioned by the Michigan Legislature through its passage of Act 359.

2. Statements Describing Line 5 in Enbridge's Application and Pre-Filed Testimony Did Not Open the Door to Determining Whether Line 5 Continues to Serve a Public Need

In its Application and pre-filed testimony, Enbridge explains that the public need for and purpose of Line 5 already has been conclusively determined by this Commission's 1953 Order and the Michigan Supreme Court's decision in *Lakehead Pipe Line Co v Dehn*, 340 Mich. 25, 37-42; 64 N.W. 2d 903 (1954). Application ¶¶ 11 and 39. Enbridge's Application and pre-filed testimony then provides a background description and general information about Line 5 and the services it

[23] In enacting Act 359, the Michigan Legislature determined that a tunnel to house the replacement pipe segment serves a "public and essential governmental purpose[]" which is "for the benefit of the people of this state and for the improvement of the health, safety, welfare, comfort, and security of the people of this state." MCL 254.324b(1). Act 359 vested the Corridor Authority with the authority to "acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel" to house the replacement pipe segment. MCL 254.324a(1) and 254.324d(1).

provides. The opposing intervenors say that providing this background information somehow opens the door to whether there is a continuing public need for Line 5 in its entirety. But this argument ignores that, as cited in the Application and pre-filed testimony, the Commission's 1953 Order conclusively approved Line 5, and the 1953 Order and *Dehn* confirmed that it serves a public purpose. Enbridge's offer to present general background information about Line 5 did not undo these conclusive determinations or make the continued public need for Line 5 at issue in this proceeding.

Finally, the opposing interveners argue that the pre-filed testimony of Marlon Samuel "opened the door" to the overall need for Line 5. MEC at p. 13. Not so. Mr. Samuel's testimony consists of three parts: an overall background description of the Lakehead System and Line 5's role in that system; the current use of Line 5; and the expected use of Line 5 after the replacement pipe segment is operating within the tunnel. As stated by Mr. Samuel: "The nature of the service to be furnished by Line 5 will remain unchanged and continue after the completion of the Project." *Id.,* at p. 5 lines 16 – 17. The purpose of Mr. Samuel's testimony is to show that Line 5's use will remain unchanged, and that the sole purpose of relocating the Line 5 Straits crossing within the tunnel is to fulfill the State of Michigan's policy, not to open the door to litigating the need for Line 5, which has already been conclusively determined.[24]

3. Any Argument that the Project will Extend the Lifespan of Line 5 is Speculative and Does Not Allow for the Reconsideration of the Need for Line 5

The opposing interveners argue that because the replacement pipe segment will be located within the tunnel and Enbridge will receive a 99-year lease for the tunnel, then the Application

[24] The opposing interveners' argument is also misplaced because Enbridge has yet to actually offer any evidence. If the Commission believes that this background information in Enbridge's pre-filed testimony opens the door to an analysis of the continuing need for Line 5, Enbridge will withdraw it.

has increased the lifespan of Line 5 for another 99 years, and the need for entirety of Line 5 must be revisited. See e.g., MEC at p. 17; BMIC at pp. 20. That is wrong.

As an initial matter, the 1953 Order already establishes that Line 5 serves a public need and provides Enbridge the authority to operate Line 5. Since neither Act 16 nor the 1953 Order place any expiration date on the authority to operate Line 5, that legal authority remains in effect until and unless it were revoked pursuant to the APA. Remand Ruling, at pp. 15-16. The Application does not change that reality. Neither does the lease term, which merely provides the maximum period during which the lease may remain in effect and does not mandate any particular length of time during which the Line 5 line must operate.

In agreeing with Staff's position, the Remand Ruling rejected the opposing interveners' argument because it is speculative, and there is no basis in Act 16 to require the extinguishment of an existing approval every time a project might extend the lifespan of a pipeline. The Remand Ruling states:

> **Staff is accurate that whether the project will expand the lifespan of Line 5 is speculative, and numerous factors will determine how long that system operates**. Initial Remand Brief, pgs. 12-14. Beyond this, the lifespan argument disregards the fact that Operators are required to maintain pipelines under federal regulations, which requires periodic maintenance or improvements on segments of the system. Id. These projects will to some degree extend, as opposed to shorten, the operational lifespan of a pipeline. **To accept the Parties contention that under Act 16 any project that extends the lifespan of a pipeline somehow extinguishes the existing approval to the point that requires a reexamination of the entire pipeline is untenable**. [*Id.* at p. 15 fn. 8 (emphasis added).]

The opposing interveners' argument is speculative and, in any event, has no basis in Act 16.[25]

[25] This argument is also pure speculation because it ignores economic reality. The longevity of Line 5 will be determined by the demand for the transportation services offered by Line 5, which is unrelated to the existence of the tunnel or Line 5's location within that tunnel. This demand for transportation service is and will be determined by the

The Application's actual public purpose has nothing to do with the lifespan of Line 5. The public purpose is to better protect the Great Lakes by relocating the Line 5 Straits crossing within a tunnel, which allows for the decommissioning the Dual Pipelines. Interveners' speculative evidence is irrelevant.[26]

V. THE COMMISSION'S PRIOR DECISIONS IN THE *WOLVERINE* CASES AND CASE U-17020 DO NOT SUPPORT AN EXPANSIVE REVIEW OF PUBLIC NEED FOR THE ENTIRE PIPELINE

The opposing interveners argue that Act 16 precedent requires an incredibly expansive review of Line 5, not limited to the replacement segment within the tunnel, but also including the "effect of the project on the system of which it is a part." MEC at 15. They argue that the scope of this case should include a broad examination of the entire operation of Line 5 and a review of its overall need. They rely on the *Wolverine* cases[27] and Case U-17020, which involved replacement of portions of Enbridge's Line 6B. The Initial Ruling rightly rejected this argument:

> 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. [Initial, p 15, fn 8.]

facilities and refineries served by Line 5; and ultimately determined by the consumer demand for the fuels generated by those facilities, not whether the Line 5's Straits crossing is within or tunnel or remains in its current location.

[26] As recognized by Staff, revisiting the public need for an entire existing facility based on an application seeking to modify a portion of that facilities to provide greater environmental protections will have a negative chilling effect on facility owners' willingness to pursue such applications in the future. (Staff's Response to Motion *in Limine* at p. 16.) Not only is this issue irrelevant, but allowing it to be pursued in this proceeding negatively impacts future replacement projects designed to better protect the environment.

[27] In re Wolverine Pipe Line Co., U-12334, 2001 WL 306697 (Mich.P.S.C. Mar. 7, 2001) ("Wolverine 1"); and In re Wolverine Pipe Line Co., U-13225, 2002 WL 31057451 (Mich.P.S.C. July 23, 2002) ("Wolverine 2").

Similarly, the Remand Ruling correctly concluded that when "reviewing a project on a segment of a pipeline under Act 16 the focus is on that activity, as opposed to the entirely previously approved pipeline." *Id.* at p 14.

Oddly, the opposing interveners reliance on the *Wolverine* cases and Case U-17020 is not based on any ruling or finding actually made in the orders in those cases. They cite no provision of those orders where the Commission, before approving a replacement segment, conducted an extensive evaluation of either: (1) the need for the entire pipeline, (2) how the replacement segment might extend the life of the existing pipeline system, (3) how the replacement segment might impact climate change, or (4) how the replacement segment might impact the environment outside the location of the replacement segment. The Initial Ruling correctly concluded that "a fair reading" of previous decisions was that the Act 16 standards applied to the replacement segment and not the entire pipeline.

Instead, the opposing interveners quote extensively from testimony offered by the parties in those past proceedings to support their argument that Act 16 somehow requires a review of the need for the entire pipeline before permitting a replacement segment. As an initial matter, whatever testimony was offered by a party in a previous proceeding does not alter the requirements of Act 16 or the Commission's prior interpretation of Act 16. What's more, the opposing interveners take out of context the quoted testimony offered in those proceedings, and ignore that those cases involved expansion of existing pipelines. Yet even in those cases, the Commission did not adopt the expansive review suggested by the opposing interveners and instead applied the Act 16 three-part test only to the pipeline segments being replaced or added.

For example, *Wolverine 1* followed the recent closure of a Total/UDS refinery in Alma, Michigan. Following the Alma refinery closure, Wolverine filed an application seeking authority

"to construct, operate, and maintain a 12- and 16-inch diameter pipeline system in Jackson, Ingham, and Clinton counties," to replace and augment local fuel supply. *Id.* at p 1. Further, *Wolverine 1* sought to: 1) connect Wolverine's Jackson Meter Station to its Stockbridge Meter Station by **adding a 20.9 mile segment**; 2) **add a new 42.3 mile segment** connecting the Stockbridge station to the LaPaugh station; and 3) upgrade the Stockbridge station by adding a 5,000 barrel tank, a sump tank with pumps, two mainline pumps, two tank booster pumps and a new control building. *Id.,* at p 3. Even though the conduct proposed in *Wolverine 1* was substantially more expansive than the conduct proposed by Enbridge's Application, the Commission did not require an expansive review of the entire pipeline—only those portions of the Wolverine line being modified.

Curiously, the opposing interveners argue that "the case for evaluating the project's effect on the system of which it is a part is actually much stronger in this proceeding than it was in *Wolverine 1*." MEC at 17. Not only did *Wolverine 1* never require an expansive review of the entire Wolverine line but also, that application involved *many miles of new* pipeline and an expansion. Whereas, Enbridge's proposed conduct involves relocating a 4-mile pipeline segment, and no expansion of Line 5's capacity. Suffice to say, the opposing interveners' contention lacks both legal authority and factual support.

The opposing interveners next argue that in Case U-17020, this "Commission reviewed the public need for the entirety of Line 6B and the Lakehead system as a whole in determining the need for the replacement segments for which Enbridge requested approval." See MEC at 18. Case U-17020 involved an application by Enbridge for approval "to construct, own, and operate approximately *110 miles of new 36-inch diameter* pipeline and 50 miles of new 30-inch diameter pipeline, *all of which replace certain 30-inch diameter pipeline segments* of its existing crude oil

and petroleum pipeline" in 10 Michigan counties. January 31, 2013 Order at pp. 1 -2; (emphasis added). In Case U-17020, Enbridge specifically sought to install a larger diameter pipe over a 110-mile segment to "meet its shippers' forecasted demands for additional pipeline capacity in the future in a cost-effective manner." *Id.* at p. 7.

In that case, Mr. Sitek (the witness that the opposing interveners extensively quote[28]) testified that replacement was a "component of Enbridge's long-term integrity management program" and that the replacement "restores the ultimate pipeline capacity of Line 6B and adds incremental pipeline capacity to meet shippers' current and future transportation requirements as well as avoids anticipated increased level of apportionment on Line 6B." January 31, 2013 Order at pp. 6 - 7. Thus, the conduct proposed in Case U-17020 was **specifically intended to increase the operating capacity of Line 6B** in addition to replacing segments as part of an integrity management program. With respect to public need, the Commission found "abundant unrefuted testimony establishing that Enbridge's shipper and refinery customers both have a present need for additional pipeline capacity."[29] *Id.,* at p 22.

Critically — and quite opposite from the opposing interveners' argument — the Commission excluded evidence relating to the operations of a portion of Line 6B that was not being replaced, finding that such evidence was irrelevant and did not address Enbridge's current application. *Id.* at p 27. While the Commission found sufficient evidence of public need for the portions of Line 6B being replaced, it specifically rejected evidence relating to other portions of

[28] MEC Appeal at 17-19.

[29] Additionally, Line 6B was subject to a federally imposed operating pressure restraint following the 2010 Marshall incident, and the Commission specifically noted that "a completely updated pipeline…will not be subject to an operating pressure restraint." January 31, 2013 Order at p. 22.

Line 6B in doing so. Thus, Case U-17020 actually refutes the position being argued by opposing interveners.[30]

The Initial and Remand Rulings properly determined that the Act 16 three-part test applied only to the segment of the pipeline being replaced and not entire pipeline. The reliance on the *Wolverine* cases and Case U-17020 by the opposing interveners is entirely misplaced. In reviewing the conduct in those cases, the Commission examined only the replacement or new segments and not the entire pipeline.

VI. THE REFERENCE TO TRIBAL RIGHTS IN THE NOTICE DOES NOT IMPACT THE SCOPE OF THIS CASE

While the Notice references that "tribal members rely on treaty protected rights … in the Straits," the Notice's recognition of this fact did not and could not expand the Commission's jurisdiction under Act 16 or MEPA over the Application. With respect to tribal rights, the Initial Ruling properly held:

> 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. [*Id.* at pp. 14 -15.]

The Initial Ruling correctly determined that the Commission's authority is limited by its grant of authority from the Michigan Legislature. As the Michigan Supreme Court has recognized: "The MPSC has no common-law powers; it has only the authority granted to it by the Legislature." *In*

[30] In the application for appeal on remand, the Tribes argue that the NHBP should be allowed to present evidence regarding Line 6B and the 2010 Marshall incident. (Tribes at pp. 13, 27 – 28.) In making this argument, the Tribes simply ignore that this Commission has earlier ruled the Marshall incident was inadmissible in Enbridge's application seeking to replace segments of Line 6B finding that such evidence "does not address Enbridge's current application to replace the remaining segments of Line 6B." January 31, 2013 Order at p. 27. Given such evidence was irrelevant to the conduct proposed in U-17020, it is even more so here.

re Reliability Plans of Electric Utilities for 2017 – 2021, 505 Mich. 97; 949 N.W.2d 73 (2020), *citing Consumers Power Co. v. Public Service Commission*, 460 Mich. 148, 155-56; 596 N.W. 2d 126 (1999). It is this statutory authority granted to the Commission by the Legislature the governs the scope of the Commission's powers and that power cannot be expanded based on a tribal treaty right.[31] Nothing in the Notice altered this analysis.

The Tribes argue that the Commission must honor tribal treaty rights in reviewing Enbridge's Application. BMIC at p. 21 – 29 and 33 – 35. Yet, the Initial Ruling does this very thing, albeit in the context of the Commission's jurisdiction. The Tribes will be allowed to fully participate in this proceeding and present evidence within the scope of case which include "whether a public need exists for [four-mile replacement segment], whether it is designed and routed in a reasonable manner, and whether its construction will satisfy applicable safety and engineering standards" and the environmental impact of the tunnel construction. *Id.* at pp. 15, 17. To the extent that the Tribes believe that their treaty rights are impacted by these issues over which the Commission has jurisdiction, then they may present that evidence for the Commission's consideration. In short, while the Tribes have certain treaty rights, those rights cannot expand the Commission's jurisdiction beyond what has been granted by the Legislature. Nothing in the Notice impacts the Initial Ruling on this issue.

VII. NOTHING IN THE NOTICE IMPACTED THE INITIAL RULING'S EXCLUSION OF EVIDENCE REGARDING THE OVERALL RISKS AND SAFETY OF LINE 5

The Initial Ruling properly excluded evidence regarding the overall operational safety of Line 5, and nothing in the Notice alters this determination. On remand, the Tribes re-argue their earlier positions taken in their initial opposition to the Motion *in Limine* with respect to their

[31] Nothing in the October 28, 2002, Government to Government Accord and the Executive Directive No. 2019 – 17 cited by the opposing interveners expands or alters the Commission's actual statutory authority set forth in Act 16 or MEPA.

position that Commission must undertake an extensive environmental review of Line 5 in its entirety before granting Enbridge's Application. BMIC, at pp. 21 – 33. They argue that relocating the Line 5 Straits crossing within a tunnel may somehow extend the lifespan of Line 5 "for decades to come" and this justifies expanding the scope of the case to the entirety of Line 5's operations including its safety. BMIC at p. 21. For all the reasons set forth above and in Enbridge's initial November 20, 2020 response to the earlier applications for leave to appeal, this argument fails because it is based on pure speculation and ignores that the purpose of the Application is to provide additional safeguards to the Great Lakes—not to extend the lifespan of Line 5. When boiled down to its essence, this argument requests that this Commission reject a safeguard for the Great Lakes because the opposing interveners have concerns regarding the safety of other portions of Line 5, and even though this Commission has no jurisdiction over interstate pipeline safety.[32]

This argument also ignores the fact that the federal Pipeline Safety Act ("PSA") provides the Pipeline and Hazardous Materials Safety Administration ("PHMSA") with exclusive jurisdiction to regulate the safety of interstate pipelines, and that Act preempts a state's authority over the safe operation of interstate pipelines. The PSA unequivocally states that: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c).[33] The PSA "leaves no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards."

[32] BMIC argues that because Enbridge presents evidence that the relocation will better protect the Great Lakes, BMIC should be allowed to present evidence to show all the other risks to the Great Lakes that they believe are caused by Line 5. An application seeking to provide an additional safeguard to the Great Lakes does not make evidence of every other perceived risk somehow relevant to the proceeding, because those additional concerns do not make the proposed safeguard more or less likely to be an improvement over the status quo.

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

Kinley Corp. v. Iowa Utilities Bd., Utilities Div. Dep't of Commerce, 999 F.2d 354, 359 (8th Cir. 1993). See also *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), and *Williams v. City of Mounds*, 651 F.Supp. 551 (D. Minn 1987) (both holding that state and local agencies lack authority to address interstate pipeline safety concerns). Accordingly, any allegations regarding the safety of Line 5's current operations are far outside the proper scope of this proceeding and the Commission's jurisdiction. To the extent the interveners have issues with the safety of Line 5's current operation, they are free to address those issues with the federal agency assigned responsibility over the safety of interstate pipelines: PHMSA.[34]

The opposing interveners make two arguments that the PSA's exclusive authority over the safety of Line 5 should be ignored and that they should be allowed to introduce evidence regarding the overall safety of Line 5. Some argue that the PSA does not apply to pipeline siting, and others argue that MEPA is not a safety standard and therefore is not preempted by the PSA. *See e.g.*, of BMIC at p. 32, and fn. 91. Both of these arguments fail.

While the PSA may leave pipeline siting to the states, the Initial Ruling did not exclude the presentation of evidence regarding safety issues relating to the siting of the replacement pipe segment at the Straits crossing. Instead, the Initial Ruling only excludes evidence regarding the previously sited and currently operating portions of Line 5 which is clearly subject to the exclusive federal jurisdiction created by the PSA. Thus, the Initial Ruling correctly balances the Commission's siting authority and PHMSA's exclusive jurisdiction over pipeline safety.

As discussed in more detail below, MEPA only allows consideration of the environmental impact of the "conduct" subject to an agency's review. MCL 324.1705. The safety of the overall operation of Line 5 is clearly not "conduct" subject to the Commission's review in this proceeding.

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

Moreover, since the Commission cannot impose safety regulations on the overall operation of Line 5, there is no valid basis or reason to review this type of evidence. The relevant issue here is whether the relocation of the Straits crossing better safeguards the Great Lakes, and the opposing interveners' disagreement with PHMSA's safety regulation over the entire pipeline is irrelevant to this issue.

VIII. THE NOTICE DOES NOT EXPAND MEPA REVIEW

A. The Notice Does Not Extend MEPA Review over the Entirety of Line 5

Next, the opposing interveners argue that the Notice expands the scope of MEPA review to include the potential environmental risks and harms of continuing to operate Line 5. MEC at pp. 29 -32; BMIC at 26 - 29 and 33 – 40; ELPC at pp. 9 – 35. Again, this argument must fail because, as recognized by Staff, the Notice does not alter the "conduct" set forth in Enbridge's application to be reviewed under MEPA. The Initial Ruling properly defined the scope of MEPA review stating: "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." *Id.* at p. 16. The Initial Ruling further stated that the "conduct" at issue is determined by the application, and concluded: "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." *Id.* at p. 18. Here, the Notice did not alter Enbridge's Application. The "conduct" or "the activity proposed in the Application" remains confined to the location of the replacement pipe segment within the tunnel. The Notice therefore has no impact on the scope of the MEPA review.

The opposing interveners argue that the Notice alters Enbridge's Application such that now the Application is seeking authority to continue to operate Line 5 or restart Line 5. This argument fails because, as discussed above, the legal authority to continue to operate Line 5 has already been granted in the Commission's 1953 Order. Exhibit A-3, at p. 9. While the Notice has spawned litigation surrounding the 1953 Easement, the Notice cannot possibly alter the prior approval granted to Enbridge to continue to operate Line 5. As explained above, any claim to the contrary violates the APA.[35]

Also, the entire premise of the argument that Enbridge would need to seek Commission approval to restart Line 5 if it were to shut down based on the Notice is based on a false and unsupported premise. The opposing interveners cite no statutory basis, Commission decision, or case law that provides a pipeline operator must seek Commission approval to re-commission (or "restart," for that matter) a pipeline. Act 16 imposes limited requirements on an operator and those are a requirement to provide maps or plats of pipelines, and common carrier or purchaser obligations. MCL 483.4 – MCL 483.6. Likewise, Rule 447 imposes a requirement to file an application before "construction" of facilities. R 792.10447. Neither Act 16 nor Rule 447 require Commission approval to "restart" a previously approved pipeline and the opposing interveners cite no such authority. Absent a statute conferring such authority to the Commission, the Commission lacks that authority. *Huron Portland Cement Co. v. Michigan Public Service Com'n,* 351 Mich. 255; 88 N.W.2d 492 (1958).

The limits of the Commission's jurisdiction over approved pipelines was demonstrated in *In re Wolverine*, January 20, 2011 Order Dismissing Application, Case No. U-16450. In that case,

[35] MCL 24.292(1); MCL 24.205(a); *Rogers v. Michigan State Board of Cosmetology*, 68 Mich. App. 751; 244 N.W.2d 20 (1976).

the Commission approved a Memorandum of Understanding, which recognized that once the Commission approved a pipeline, the operator was free to ship any hydrocarbons on the pipeline and there was no need to seek Commission approval to switch service from a products line to a crude line. *Id.,* at ¶6 of Memorandum of Understanding. In doing so, the Commission did not review under MEPA any environmental impacts, including impacts on climate change, with respect to this change of service. While the Commission may assert authority over the construction of a pipeline, the Commission does not assert authority over the use of and services provided over the pipeline once constructed. Similarly, there are no legal requirements to obtain Commission approval to stop or restart an approved pipeline as erroneously suggested by the opposing interveners.

B. The Notice Does Not Extend MEPA Review Over Greenhouse Gases

The Notice also does not extend MEPA review to the potential greenhouse gases ("GHG") caused by the fossil fuels transported by Line 5. As the Initial Ruling properly concluded "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." *Id.* at p. 19. The Initial Ruling reasoned:

> 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. [*Id.* at p. 18.]

Citing the *Buggs* decision, the Initial Ruling recognized that the Commission "lacked jurisdiction over the drilling of gas wells and the extraction process" and limits "its review and MEPA analysis to the issue over which it had jurisdiction, the construction and operation of the pipelines." *Id. at* p. 19, citing Case Nos. U-17195/U-17196, September 23, 2015 Order, p. 7; and *Buggs. v Public Service Commission*, unpublished per curium decision of the Court of Appeals, issued May 16, 2017 (Docket Nos. 329781 and 329909).) Nothing in the Notice changes the Commission's jurisdictional review pursuant to MEPA.

The Initial Ruling followed the *Buggs* decision and considered only the direct conduct over which the Commission had jurisdiction and refused to consider other potential conduct outside of its jurisdiction. The opposing interveners ask the Commission to ignore *Buggs* and instead consider all the possible indirect conduct including that of others that may flow from the conduct under review and the potential for pollution that indirect conduct may cause. First, this argument is not supported by the language of MEPA which 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**. [MCL 324.1705(2).]

MEPA's plain language is focused on the actual conduct under review by the agency and not the indirect conduct of unregulated third-persons. Here, the Commission does not authorize or approve of the use of fossil fuels by consumers which may create GHG. Such an expansive interpretation of the Commission's authority runs afoul of the requirement that an agency's grant of authority "must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Union Carbide Corp. v. Public Service Commission*, 431 Mich. 135, 151; 428 N.W.2d 322 (1988),

quoting Mason Co. Civic Research Council v. Mason Co., 343 Mich. 313, 326-27; 72 N.W.2d 292 (1955).

The case law cited by the opposing interveners also does not support their argument. *Nemeth v. Abonmarche Dev.*, 457 Mich. 16, 576 N.W.2d 641 (1998), sets forth the standard for reviewing MEPA established in *Ray v. Mason Co. Drain Comm'r*, 393 Mich. 294, 224 N.W.2d 883 (1975); "the trial judge must find facts on which the plaintiff claims to have made a prima facie case under the MEPA, that is, what conduct of the defendant 'has or is likely to pollute, impair or destroy the air, water or other natural resources." The Michigan Supreme Court clarified the holding in *Nemeth* in its subsequent decision, *Preserve The Dunes, Inc. v. Dep't of Environmental Quality*, 471 Mich. 510, 684 N.W. 2d 847 (2004). There, the court made clear that in *Nemeth*, "as in all MEPA actions, the focus [i]s on the defendant's actual conduct." *Id.* at 517. Like here, the plaintiffs sought to introduce evidence outside the scope of MEPA, including evidence of the defendant's "allegedly deficient past relationship to the mining property negatively affect[ing] the environment." *Id.* at 518. The court went onto hold that "[w]here a defendant's ***conduct itself*** does not offend MEPA, no MEPA violation exists." *Id.* (emphasis added). Under MEPA, the conduct of the Applicant which is to be reviewed and not that of others.

The opposing interveners' argument also vastly overstates the Commission's required review under MEPA. In *Buggs v. Public Service Commission*, Nos. 315058, 315064, 2015 WL 159795 (Mich. App. Jan. 13, 2015), the court recognized that it was not the role of the Commission to "enforce the MEPA or another environmental law." *Id*. at p. 7. The court did not require extensive review, let alone any review of climate change, in order to satisfy MEPA. In fact, the court concluded that the Commission is not required to even "conduct an independent investigation" to satisfy MEPA, stating that although MCL 324.1705(2) [MEPA] "required a

determination that took an environmental element into account, appellants incorrectly suggest that it required the Commission to conduct an independent investigation. There is no language in the statute to suggest that the Commission had any such duty." *Id*. at p. 8. Similarly, in *In Re Application of Encana Oil & Gas re Garfield 36 Pipeline*, No. 329781, No. 329909, 2017 WL 2130276 (Mich. App. May 16, 2017), the court further clarified that in order to comply with MEPA, the Commission need not grant petitions to intervene or conduct a contested case hearing.

Finally, the opposing interveners argue that the September 23, 2020 Executive Directive No. 2020-10 ("Executive Directive") regarding "Building a Carbon-Neutral Michigan" somehow expands the scope of review under MEPA. See e.g., BMIC at p. 38. As an initial matter, this Executive Directive is outside the scope of the Remand. The Remand requested a review of the impact, if any, of the Notice, not the September 23, 2020 Executive Directive. In any event, the Commission's review under MEPA is governed by statute, not an Executive Directive. MEPA's statutory mandate requires review of the "conduct" to be "authorized or approved" by a given application. MCL 324.1705. Here, Act 16 provides the Commission authority to review the location of the replacement pipe segment within a tunnel - - and not GHG. The opposing interveners cite no Commission decision or caselaw that has ever allowed the Commission in its MEPA review to consider GHG in an Act 16 proceeding. The required statutory authority for such a review does not exist, and the Executive Directive cannot expand Commission jurisdiction.[36]

Moreover, nothing in the Executive Directive requires any change to the scope of the MEPA analysis in this proceeding. The Executive Directive sets forth a series of goals and identifies certain actions designed to address climate change. However, nothing in the Executive

[36] The Commission "has only the authority granted to it by the Legislature." *In re Reliability Plans of Electric Utilities for 2017 – 2021,* 505 Mich. 97, 119; 949 N.W.2d 73 (2020), *citing Consumers Power Co. v. Public Service Commission*, 460 Mich. 148, 155-56; 596 N.W. 2d 126 (1999).

Directive speaks to, much less enlarges, the scope of MEPA review in a proceeding concerning merely the replacement of a segment of an existing pipeline.

IX. THE NOTICE DOES NOT GRANT THE COMMISSION JURISDICTION OVER THE PUBLIC TRUST DOCTRINE OR THE GREAT LAKES SUBMERGED LANDS ACT

FLOW seeks to litigate a host of legal issues related to the 2018 easement issued by MDNR to the Corridor Authority for the location of the tunnel (including the replacement line to be located in the tunnel), the assignment of those easement rights to Enbridge and the 99-year lease for the tunnel to be entered between Authority and Enbridge. While FLOW argues that the 2018 easement, its assignment and the lease (which does not become effective until the tunnel is completed) were issued in violation of the public trust doctrine and the Great Lakes Submerged Lands Act, those arguments are well outside of the Commission's jurisdiction. This Commission's authority is limited and extends only to those issues that the Legislature delegates to it.[37] The Michigan Legislature has granted no authority to the Commission to resolve disputes regarding the public trust doctrine or the Great Lakes Submerged Lands Act, and FLOW cites none.[38] As correctly determined by the Initial and Remand Rulings, the Commission lacks jurisdiction over these collateral disputes.

X. RELIEF REQUESTED

WHEREFORE, Enbridge Energy, Limited Partnership, respectfully requests that the Commission summarily deny the applications or, at a minimum, deny the relief the applications request.

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[37] *In re Reliability Plans of Electric Utilities for 2017 – 2021,* 505 Mich. 97, 119; 949 N.W.2d 73 (2020), *citing Consumers Power Co. v. Public Service Commission*, 460 Mich. 148, 155-56; 596 N.W. 2d 126 (1999).

[38] The grant of statutory authority "must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Union Carbide Corp. v. Public Service Commission*, 431 Mich. 135, 151; 428 N.W.2d 322 (1988), *quoting Mason Co. Civic Research Council v. Mason Co.*, 343 Mich. 313, 326-27; 72 N.W.2d 292 (1955).

Respectfully submitted,

Dated: March 23, 2021

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Michael S. Ashton
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ATTACHMENT

A

MPSC Docket No. U-20763

APPLICANT ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S RESPONSE TO THE APPLICATIONS FOR LEAVE TO APPEAL ON REMAND FILED BY FOR LOVE OF WATER, ENVIRONMENTAL LAW & POLICY CENTER, MICHIGAN CLIMATE ACTION NETWORK, BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, MICHIGAN ENVIRONMENTAL COUNCIL, TIP OF THE MITT WATERSHED COUNCIL, AND NATIONAL WILDLIFE FEDERATION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, et al.,

Plaintiffs,

v.

GRETCHEN WHITMER, et al.,

Defendants.

Case No. 1:20-cv-1141

HON. JANET T. NEFF

STATE OF MICHIGAN, et al.,

Plaintiffs,

v.

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, et al.,

Defendants.

Case No. 1:20-cv-1142

HON. JANET T. NEFF

JOINT NOTICE OF THE PARTIES REGARDING SELECTION OF A FACILITATIVE MEDIATOR

The Parties submit this Joint Notice pursuant to the Court's Order of February 18, 2021. *See* Order, ECF No. 16, 1:20-cv-1141 PageID.84-87 and ECF No. 20, 1:20-cv-1142 PageID.268-271. In that Order, the Court directed that the parties inform the Court within 28 days (or by March 18) of the status of the parties' efforts with respect to selection of a facilitative mediator.

The Parties have collaborated as directed by the Court, and as a result jointly elected to seek the services of former United States District Judge Gerald Rosen to act as a mediator in the parties' efforts to find a potential global resolution of their dispute. As the Court is undoubtedly

aware, Judge Rosen is the former Chief Judge of the United States District Court for the Eastern District of Michigan. Judge Rosen has agreed to serve as mediator in these matters.

The parties and Judge Rosen spoke at length in a conference call held on March 12, and have agreed to an initial mediation session to be held on April 16. One of the topics to be discussed at this initial mediation session will be development of an estimate of the time expected to be needed for the mediation. Following the April 16 session, the Parties will inform the Court of the estimated amount of time needed by means of an additional Joint Notice.

Respectfully submitted,

MICHIGAN DEP'T OF ATTORNEY GENERAL

/s/ Robert P. Reichel (w/ permission)
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Attorneys for Enbridge Parties

Dated: March 16, 2021

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

IN RE ENBRIDGE ENERGY, LIMITED PARTNERSHIP	)	
	)	**Case No. U-20763**
Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 *et seq.* and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief	)	

CERTIFICATE OF SERVICE

Angela R. Babbitt hereby certifies that on the 23rd day of March, 2021, she served **Applicant Enbridge Energy, Limited Partnership's Response to the Applications for Leave to Appeal on Remand Filed by For Love Of Water, Environmental Law & Policy Center, Michigan Climate Action Network, Bay Mills Indian Community, Grand Traverse Band Of Ottawa And Chippewa Indians, Little Traverse Bay Band Of Odawa Indians, Nottawaseppi Huron Band Of The Potawatomi, Michigan Environmental Council, Tip Of The Mitt Watershed Council, and National Wildlife Federation**, and this Certificate of Service in the above docket on the persons identified on the attached service list by electronic mail.

Angela R. Babbitt

Angela R. Babbitt

Digitally signed by Angela R. Babbitt
Date: 2021.03.23 14:54:27 -04'00'

Service List for U-20763

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