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August 16, 2013

Kimberly Hauser, Clerk
Michigan Court of Appeals, Fourth District
925 W Ottawa
Box 30022
Lansing, MI 48909-7522

Re: In re application of Encana Oil & Gas Inc
Michigan Public Service Commission Cases Nos U-17195, U-17196
Court of Appeals Cases Nos 315058, 315064

Dear Ms. Hauser:

As you know I represent appellants Buggs and Bonamie in the above matters.

Attached please find (a) appellants' brief in opposition to motion to dismiss, and (b) appellants' notice of the MPSC decision denying rehearing.

In regard to (a) please note many of the footnotes rely on the MPSC record, which Encana's counsel, on August 7, requested the MPSC to forward to the court. A copy of his letter (addressed to the court clerk in Grand Rapids) should be in your file. I assume the record is on its way or will be shortly.

Also in regard to (a), I will be e-filing this letter and the brief as .pdf's later this afternoon. Per a glitch in my own software, I am unable physically to incorporate the one-page exhibit which the brief says is attached into that .pdf file, even though I was able to incorporate the cover for it which simply says "Exhibit 1." Accordingly I will e-file the one-page exhibit as a separate .pdf. If your own software is capable and if the court is willing, I ask that the brief and the exhibit be combined into a single document on receipt and filed that way.

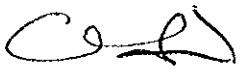
In regard to (b), notice that the MPSC's decision is dated June 28. Today is August 16, but this court's April 3 order had required appellants to notify the clerk within 14 days, which was long ago.

The reason for the tardy submission is that, as explained in our notice, appellants did not learn of the decision until August 8, on receipt of Encana's motion to dismiss these appeals. As can be seen from the MPSC's proof of service, undersigned counsel was not on the agency's service list.

Today is within 14 days of August 8, so appellants trust this submission will be considered substantial compliance with the court's April 3 order.

Please call or write if there is any question. Thank you.

Very truly yours,



Ellis Boal

Encl

c:
Mary Jo Kunkle, Michigan Public Service Commission, 6545 Mercantile Way, Box 30221, Lansing, MI, 48909
William Horn, 900 Monroe Avenue NW, Grand Rapids, MI, 49503

State of Michigan
Court of Appeals

In re application of Encana Oil & Gas Inc

John Buggs and Daniel Bonamie,
Appellants — MPSC Case No U-17195

Michigan Public Service Commission and
Encana Oil & Gas (USA) Inc,
Appellees — CA Case No 315058

_____/

In re application of Encana Oil & Gas Inc — MPSC Case No U-17196

John Buggs and Daniel Bonamie,
Appellants — CA Case No 315064

Michigan Public Service Commission and
Encana Oil & Gas (USA) Inc,
Appellees

_____/

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Appellants' Brief in Opposition to Motion to Dismiss

Oral Argument Not Requested

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Table of Authorities

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Basis of Jurisdition

The court has jurisdiction under MCL 462.26 and 324.1701 et seq, and MCR 7.203(A)(2).

Question Presented

May putative intervenors in an MPSC proceeding appeal an MPSC decision holding they lacked standing to this court, under MCL 462.26, MCL 324.1701 et seq, and MCR 7.203(A)(2)?

- The Michigan Public Service Commission did not address the question.
- Encana says "No."
- Appellants say "Yes."

I. Introduction

Encana asks this court to dismiss the appeal.

The motion notes on June 28, 2013, the MPSC issued a final denial of rehearing rejecting appellants' request to intervene for lack of standing.

The motion asserts appellants have not appealed, though they did appeal on March 4 and the court granted their motion to stay.

Appellants were not notified of the MPSC June 28 denial until August 8 when the company's motion arrived attaching a copy, over five weeks after June 28.

Per the court's April 3 order, appellants were to promptly file the order with the clerk. Unaware of it appellants did not do so. They are filing it instead herewith, which is within 14 days of August 8. Appellants trust the court will deem that substantial compliance.

In due course the court will receive the MPSC records of the two cases, per Encana's August 7 request that they be forwarded.[1] Many of the notes below draw on materials from those records.

II. Proceedings

As the court knows from the prior proceedings,[2] on January 11, 2013, Encana

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1 The record for the Garfield line (# 17195) is also accessible at *http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=17196&submit.x=0&submit.y=0* . The record for the Beaver Creek line (# 17196) is also accessible at *http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=17195&submit.x=0&submit.y=0* .

2 See appellants' motion to stay appellate proceedings of March 15, court orders of

applied for pipelines for two new wells in Kalkaska and Crawford Counties. It asked the MPSC to handle the matter *ex parte*.[3] Twenty days later on January 31 with no record of a staff investigation, MPSC approved the applications as requested.[4]

Appellants John Buggs and Daniel Bonamie had not known of or been parties to the proceeding. Because of Encana's request for speedy *ex parte* handling, they had no opportunity to intervene before January 31. They learned of the proceedings and the order only later through friends and the media.[5]

The January 31 orders ended with this notice:

> Any *party* desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.[6]

Buggs and Bonamie appealed and at the same time, per the statute,[7] applied to the MPSC to intervene, consolidate proceedings, vacate the decisions, and hold a hearing to receive additional evidence.[8]

Citing article 4 section 52 of our constitution, the Michigan environmental

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March 25 and April 3 consolidating and granting the motion to stay, and appellants' notice on April 30 of and MPSC decision and their intention to seek reconsideration.

3 17195 R001, Garfield application section 10(h), 1/11/13, 17196 R001, Beaver Creek application section 10(h), 1/11/13.

4 17195 R003, approval p 2, 1/31/13; 17196 R003, approval p 2, 1/31/13.

5 17195 R008, Buggs 3/7/13 affidavit ¶ 5 and Bonamie 3/25/13 affidavit ¶ 5; 17196 R009, same.

6 Emphasis added.

7 "Within 28 days from the filing of an appeal, *a party* may make application to the commission to present additional evidence." MCL 462.26(6) (emphasis added).

8 17195 R005, application to intervene, 3/7/13; 17196 R005, same.

protection act ("MEPA"), MCL 324.1701 et seq, and the common law,[9] they noted Encana's not-fully-disclosed plans for hundreds of wells across the state's northern lower peninsula, largely in the area inhabited by endangered Kirtland's warblers. They noted the lack of credentials of the company's environmental expert. They pointed to the expert's failure to discuss impacts on terrain and wildlife next to but not actually in the 35-foot easement, the impacts of opportunistic exotic species attracted to the widened corridor, and the "extreme" fragmenting impact of the hundreds of wells which is suggested by a USGS study of gas development in comparable rural counties in Pennsylvania.

At the time neither Encana nor MPSC objected to their standing to appeal to this court, or their standing to ask the MPSC to hear new evidence.

On appellants' motion, on April 3 this court stayed appellate proceedings. The order also required them to file any MPSC orders within 14 days with the clerk.

MPSC considered their applications to intervene, consolidated the two proceedings as requested, and adjudicated them on April 16, holding appellants lacked standing. The decision contained the same notice of appeal rights at the end. MPSC served it on Encana and appellants.[10]

Appellants promptly notified the court of the decision and their intention to seek reconsideration at the MPSC level.

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9 17195 R005, application to intervene, ¶ 13, 3/7/13; 17196 R005, same.
10 17195 R009, order, 4/16/13; 17196 R010, same.

On reconsideration, after receipt of briefs from both sides,[11] on June 28 MPSC again rejected appellants' standing as intervenors.[12] Unlike the decision of April 16, MPSC's proof on June 28 shows service only on Encana, at three different addresses. There is no proof of service on undersigned counsel.[13]

Encana has now moved to dismiss the appeal, and asked the MPSC to forward its record to the court.

Herewith appellants are filing a copy of the June 28 denial, in hopeful substantial compliance with the April 3 order.

III. Argument

As the motion acknowledges, MCL 324.1701 et seq and MCL 462.26 normally provide for appeals of this nature. But it questions appellants' appellate standing.

The court should deny the motion for two reasons. First the court already rejected it implicitly. Second it has no legal basis anyway.

A. The court already ruled on appellants' appellate standing without objection from Encana.

When appellants claimed an appeal under MCL 462.26 on March 4, Encana did

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11 17195 R010, motion for reconsideration 5/15/13, R011 Encana objection 6/4/13, R012 appellants' reply 6/14/13; 17196 R011, R012, R013, same.

12 17195 R013, order denying rehearing, 6/28/13; 17196 R014, same.

13 17195 R013, order denying rehearing, last pages, 6/28/13; 17196 R014, same.

not object. The court, which like Encana was presumably aware of the legal doctrines in the motion today, implicitly accepted their standing as "parties in interest" under the statute, and issued orders in their favor. Being under the court's jurisdiction, had ever Buggs and Bonamie refused compliance with an order – say if they deliberately refused to file a copy of an MPSC decision – the court could have sanctioned them.

Likewise MPSC itself accepted their standing, if only for the purpose of treating their application to present new evidence under MCL 462.26(6). So did Encana, which made no objection in briefing responses to the application.

Today Encana is reversing tack and trying to pull out the rug – after months of time-consuming briefs and orders – to claim appellants should never have been allowed in the door in the first place. But the court has ruled.

B. The court's consent to appellants' standing was correct.

The standing-to-appeal argument is really the same as the main issue, appellants' standing to intervene. The argument amounts to a plea that the matter be handled as Encana requested originally, *ex parte*, with it as the sole party and a powerful new MPSC precedent in hand wiping out decades of pro-environment decisions.

Should appellants succeed in this appeal, the remedy will simply be an order that the MPSC consider their evidence. The quality or persuasiveness of the evidence is not before the court.

Encana cites two authorities. They are distinguishable.

In *Federated Insurance Co v Oakland County Road Commission*[14] the attorney general sought timely review in the supreme court of a decision of the court of appeals. But he had not represented or been a party nor had he intervened in any way in the court of appeals. No one who actually was a party in the court of appeals sought review. The court rejected the AG appeal for that reason.

First, unlike the AG, Buggs and Bonamie did move to intervene in the lower tribunal. That disposes of *Federated Insurance.*

Second, even if *Federated Insurance* were relevant, it relied heavily on *National Wildlife Federation v Cleveland Cliffs Iron Co,*[15] citing it four times. That case has been overruled,[16] which undermines *Federated Insurance.*

Third, even if *Federated Insurance* were resuscitated, the nub of its holding was this:

> [T]o have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from the underlying facts of the case.[17]

Unlike in that case, appellants here do have a particularized injury. For this, see their

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14 475 Mich 286, 715 NW2d 846 (2006).
15 471 Mich 608, 684 NW2d 800 (2004).
16 *Lansing Schools Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349, 371; 792 NW2d 686 (2010).
17 475 Mich at 291-92.

reply brief to the MPSC on reconsideration,[18] summarizing the facts in the agency's record:

> 17. . . . [Petitioners (appellants in the court of appeals)] live at the end of Hydrangea Trail. They are part of a small enclave, an inholding in the state forest. See the attached snapshot taken from the DNR webpage on January 8,[19] to which a red line has been added showing the pipeline.[20] Note the white L-shaped enclave in section 14 surrounded by state land containing Hydrangea Trail, near the Beaver Creek well. Petitioners live in this enclave.
>
> 18. For petitioners who made life decisions to seek out and inhabit such isolated habitat and enjoy it with their closest people [guests and family, mentioned earlier in the reply brief], it is self-evident that fragmentation of the deep forest and inevitable introduction of exotic species would diminish their sense of well-being and self-esteem.
>
> 19. The Beaver Creek pipeline is just a half-mile away. Rare and beautiful Kirtland's warblers visit their back yards, the enjoyment of which they allege will be diminished. Encana does not dispute that the pipelines will affect the birds' habitat, and that of other protected species. . . .

The reason appellants adduced these facts was to invoke the doctrine of recreational standing, recognized by decisions of the Michigan and US supreme courts. Plaintiffs may proceed under the doctrine if damage to observable rare species habitat is threatened on land adjacent to what they own or regularly traverse, even if not on their own land.[21]

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18 17195 R012, appellants' reply p 5, 6/14/13; 17196 R013, same.

19 *http://www.dnr.state.mi.us/spatialdatalibrary/pdf_maps/mineral_lease_information/crawford_lease_information.pdf* . [This note is re-numbered from the numbering in the brief.]

20 The map is attached as an exhibit to this brief.

21 *Michigan Citizens for Water Conservation v Nestlé Waters North America,* 479 Mich 280, 300, 310, 737 NW2d 447, 458, 463 (2007); *Friends of the Earth v Laidlaw Environmental Services Inc,* 528 US 167, 182-83 (2000); *Sierra Club v*

The June 28 decision rejected appellants' contention that unlike the public at large they exercise their recreational observation rights regularly, every time they step out the back door. The courts have been adamant that only a NIMBY plaintiff will qualify.[22] Well that's just what Buggs and Bonamie are. See attached exhibit, showing the Hydrangea Trail inholding.[23] Their status will be at the heart of the appeal if the court reaches the merits of standing as intervenors, as we think it should. But it is also relevant to Encana's motion: Consistent with *Federated Insurance*, if the MPSC decision stands, record facts show their injuries will be *very* particular.

Encana's second authority is a passage from a treatise:

> The second obvious rule is that one cannot be an aggrieved party on appeal if one is not a "party" to the appeal. These cases generally fall into one of two groups. The first are those cases in which the person seeking appellate relief failed to *perfect his or her status* as a party either at the trial level or on appeal. Examples are unsuccessful or incomplete intervenors.[24]

Before considering the passage it is instructive to note that Michigan and federal reports are filled with decisions which *do* allow a disappointed intervenor to appeal a denial of

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Morton, 405 US 727, 735 (1972); *Lujan v Defenders of Wildlife*, 504 US 555, 562-563 (1992); *Cantrell v City of Long Beach,* 241 F3d 674, 681 (CA9, 2001).

22 Compare *Lujan v National Wildlife Federation*, 497 US 871, 886-89 (1990) (assertions that the affiants use unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur, are not sufficient); *Lujan v Defenders of Wildlife*, 504 US 555, 562-64 (1992) (assertions that affiants traveled to foreign lands to observe rare species in the past and have unspecific intent to return in the future are insufficient).

23 Taken from their reply brief on reconsideration, 17195 R012, appellants' reply, 6/14/13; 17196 R013, same.

24 6 Martin Dean & Webster, *Michigan Court Rules Practice* (5th edition, 2011), § 7203.1, page 168 (emphasis added).

intervention.[25] Encana does not mention these cases. Nor does it mention the single illustrative case cited by the footnote at the end of the passage, *Kolar v Hudson.*[26]

Kolar was an attorney fee dispute where, unlike at the MPSC,[27] rigorous court procedural rules applied. The *Kolar* intervenor had not "perfected his status" by following procedures for intervenors; he did not tender a proposed pleading and there was technically nothing for the court to adjudicate.

By contrast these appellants did everything "perfectly." As an agency case, this case is here under MCL 462.26 and MCR 7.203(A)(2), not (A)(1) as apparently was *Kohler.* MPSC rules require only that a petitioner "who claims an interest" set out clearly and concisely the "facts supporting the . . . alleged right or interest".[28]

There has been no suggestion that Buggs's and Bonamie's motion and affidavits were not clear and concise or did not explain their interest or their claim that Encana's pipelines should be rejected on environmental grounds.[29]

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25 See e.g. *Scion Inc v Martinez*, 491 Mich 889 (2012) (court of appeals erred in vacating trial court's decision granting motion to intervene and invalidating writ of garnishment); *Oliver v Department of State Police*, 160 Mich App 107 (1987) (minor child permitted to appeal denial of intervention in litigation by father); *Trbovich v United Mine Workers*, 404 US 528 (1972) (union member successfully appealed district court's denial of intervention in suit against union by secretary of labor); *Auto Workers v Scofield*, 382 US 205 (1965) (union successfully appealed denial of intervention in federal NLRB enforcement proceedings in circuit courts).

26 55 Mich App 114, 222 NW2d 53 (1974).

27 See e.g. R 460.17325 (court rules of evidence are followed "so far as practicable"), R 460.17501 ("complaint may be either formal or informal").

28 R 460.1720.

29 17195 R005, application to intervene ¶ 17, 3/7/13; 17196 R005, same.

MPSC understood what they wanted and rejected it, in capacious terms:

- *Sub silentio* it overruled at least three prior decisions holding "both local land owners and the general public must be protected from unwarranted damage to their property and *the environment as a whole.*"[30]

- *Sub silentio* it overruled a decision saying "the requirements for intervention before this Commission are not quite as strict as those applied by the courts."[31]

- Holding that act 9 is a creature of the legislature, it rejected the doctrine of *Michigan State Highway Commission v Vanderkloot*[32] *and Ray v Mason County Drain Commissioner*[33] that MEPA too is such a creature. Just as MEPA requires the highway commission to import an "environmental element" into its statutory "necessity" standard for highway condemnations, those cases mean MPSC must consider environmental effects of a pipeline proposal when considering act 9's "convenience and necessity" standard[34] as well as the requirement to preserve "the public peace, safety, and convenience" in relation to natural gas.[35] A footnote in *Vanderkloot* favorably cited a newspaper editorial: "But as the state has grown, and the demand for energy, the public interest has been threatened by casual planning of transmission lines and *pipelines through unspoiled countryside.*"[36]

- It overlooked the dramatic contradiction (pointed out in appellants' reply on reconsideration[37]) between Encana's attorney and its environmental expert over the route of the proposed Beaver Creek pipeline near appellants' back yards. The line would go along King Road, a woodland two-track.[38] The environmental

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30 MPSC Case # U-9804 (5/17/91) p 14; case # U-9138 (11/10/88), p 6; case # U-9852 (9/25/91), p 12 (emphasis added).

31 MPSC Case # U-9138 (11/10/88), p 5.

32 392 Mich 159, 184-85, 190, 220 NW2d 416 (1974) ("Environmental Element in 'Necessity' Standard [of highway condemnation proceedings]").

33 393 Mich 294, 306, 224 NW2d 884 (1975) ("[MEPA] . . . imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities [citing relevant pages of *Vanderkloot*].").

34 MCL 483.109.

35 MCL 483.114.

36 392 Mich at 186 n 10.5 (emphasis added).

37 17196 R013, reply ¶ 13, 6/14/13.

38 17196 R009, Bonamie affidavit ¶ 3 ("Much of King Road is seasonal two-track, a

expert said it would be "adjacent to" existing corridors such that no new corridors would be created,[39] meaning it would widen the King Road two-track.[40] The attorney said to the contrary the pipeline would be "within" the existing corridor.[41] Both cannot be true. The commission thus had no concern for its statutory mission[42] to ascertain the exact "route" of the Beaver Creek line. It had no concern about the extent of fragmentation it would cause, its intensity as a vector for exotic species, or the veracity of company agents. Even if no party had standing, the decision undercut the integrity of MPSC processes, in approving a project even as MPSC members knew the applicant was disrespecting it with contradictory assertions.

IV. Conclusion

Intervention standing was the MPSC's only holding on June 28 and will be the only issue addressed in the merits of this appeal. Encana does not ask the court to limit its consideration to that. Instead it asks boldly that their entire appeal be discarded.

Buggs and Bonamie are aggrieved by the MPSC denial of rehearing. The court should deny the motion and allow their appeal to proceed in the normal course.

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snowmobile trail in winter."), Buggs affidavit ¶ 3 (same).

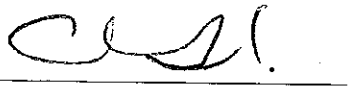
39 17196 R002, environmental impact assessment section II ("The entire proposed route is *adjacent to* existing corridors such that no new corridors will be created." emphasis added), 1/11/13.

40 17196 R009, Bonamie affidavit ¶ 16 ("35-foot easements"), Buggs affidavit ¶ 16 (same).

41 17196 R012, objection to motion for reconsideration, ¶¶ 1 (Beaver Creek pipeline will be "within existing road corridors"), 17 (same), 6/4/13.

42 MCL 483.109.

Respectfully submitted,



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Dated: August 16, 2013

Certificate of Service

I certify that on August 16, 2013, I served the above pleading on the following by regular mail:

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Grand Rapids, MI 49503

Mary Jo Kunkle
Michigan Public Service Commission
6545 Mercantile Way
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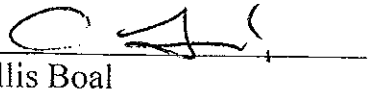

Ellis Boal

Exhibit 1

State of Michigan
Court of Appeals

In re application of Encana Oil & Gas Inc

John Buggs and Daniel Bonamie,
Appellants — MPSC Case No U-17195

Michigan Public Service Commission and Encana Oil & Gas (USA) Inc,
Appellees — CA Case No 315058

_____/

In re application of Encana Oil & Gas Inc — MPSC Case No U-17196

John Buggs and Daniel Bonamie,
Appellants — CA Case No 315064

Michigan Public Service Commission and Encana Oil & Gas (USA) Inc,
Appellees

_____/

Notice of MPSC Decision Denying Rehearing

On April 3, 2013, this court ordered a stay of appellate proceedings until the Michigan Public Service Commission disposes of the petition to receive additional evidence and, if additional evidence is received, issues a final order after consideration of the additional evidence.

The court also ordered appellants to file copies in this court of all MPSC orders within 14 days of entry.

On June 28, 2013, on reconsideration the MPSC issued a denial of rehearing

rejecting appellants' petition to interevene on the ground that they lack standing. A copy is attached.

The proof of service attached to the order shows mailing to only one party, Encana, at three addresses. There is no showing of service on undersigned counsel. He learned of it only on August 8, 2013, on receipt of papers from Encana, to which it was attached.

Appellants trust this notice will be considered substantial compliance with the court's April 3 order.

Respectfully submitted,

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Ellis Boal

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **ENCANA OIL & GAS (USA) INC.** for authority to construct and operate the Garfield 36 Pipeline in Garfield Township, Kalkaska County, Michigan.	Case No. U-17195
In the matter of the application of **ENCANA OIL & GAS (USA) INC.** for authority to construct and operate the Beaver Creek 11 Pipeline in Beaver Creek Township, Crawford County, Michigan.	Case No. U-17196

At the June 28, 2013 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John D. Quackenbush, Chairman
Hon. Orjiakor N. Isiogu, Commissioner
Hon. Greg R. White, Commissioner

ORDER DENYING REHEARING

On January 11, 2013, Encana Oil & Gas (USA) Inc. (Encana) filed applications pursuant to the provisions of 1929 PA 9, MCL 483.101 *et seq.* (Act 9), requesting authority to construct and operate the Beaver Creek 11 Pipeline and the Garfield 36 Pipeline. On January 31, 2013, the Commission issued orders approving the construction and operation of both pipelines.

On March 4, 2013, pursuant to MCL 462.26, Daniel Bonamie and John Buggs (Petitioners) filed a claim of appeal with the Michigan Court of Appeals.[1] On March 7, 2013, the Petitioners filed a petition to intervene, consolidate proceedings, vacate the decisions, and hold a hearing to receive additional evidence. On April 16, 2013, the Commission issued an order denying the Petitioners' request to intervene (April 16 order).

On May 15, 2013, the Petitioners filed a motion for reconsideration requesting that the Commission reconsider their petition to intervene. In their motion, the Petitioners allege certain procedural irregularities, including the following: (1) that, contrary to Encana's proof of service, they never received Encana's objections to their petition to intervene; (2) that they were not apprised of the hearing date on their petition until it was too late for counsel to make it to the meeting; and (3) that they never received any correspondence from the Commission regarding the status of their pending petition to intervene.

In addition to these initial procedural issues, the Petitioners argue that their petition should be granted because state court precedent indicates the Petitioners have standing whether they own land across which the pipeline traverses or not. The Petitioners further point out that the Commission failed to complete a thorough investigation into the environmental impact assessment filed in this matter. The Petitioners also assert that, because "modern law" has "overtaken" Act 9's list of limited criteria to be considered in approving Act 9 pipeline construction projects, the Commission must consider the likely environmental effects of the proposed conduct. Finally, the Petitioners allege that the "zone of interests" in this case includes the interests of the environment, not simply those of Act 9. Specifically, those interests include: the Petitioners'

[1] The Court of Appeals issued an order on April 3, 2013, granting Petitioners' motion to stay appellate proceedings and hold the appeal in abeyance until the Commission disposes of the petition to intervene.

recreational interests, their claim that the pipelines diminish the habitat for Kirtland's warblers and other protected species, and their contention that forest fragmentation due to pipeline construction would result in invasive species encroaching in the affected areas.

On June 4, 2013, the Commission received Encana's objections to the Petitioners' motion for reconsideration.

Discussion

Rule 403 of the Commission's Rules of Practice and Procedure of 1992 AACS, R 460.17403, provides that an application for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. An application for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

As discussed below, the Commission finds that the Petitioners have failed to meet their burden of demonstrating legitimate grounds for granting rehearing on any of the issues presented in their motion. Thus, the request for rehearing should be denied.

Procedural Issues

The Petitioners first argue that, contrary to Encana's proof of service, they never received a copy of the objections that Encana filed in response to their petition to intervene. The Commission allows for service of process via first-class regular mail or by delivery in person. *See*, R 460.17109 of the Commission's Rules of Practice and Procedure. In past cases, Michigan courts have considered similar arguments where one party filed a proof of service alleging proper service via first-class mail and the party being served contested proper service of process. In *Kloian v Van*

Fossen, unpublished per curiam opinion of the Michigan Court of Appeals issued January 21, 2010, (Docket No. 287812), *lv den*, 488 Mich 911 (2010), a panel of the Michigan Court of Appeals identified the evidentiary burdens required to contest service of process as follows:

> A proof of service that is regular on its face creates a rebuttable presumption of proper service, see *Garey v. Morley Bros.*, 234 Mich. 675, 676-677, 209 N.W. 116 (1926), and "[t]he quantum of evidence required ... to overthrow proof of service regular on its face is considerable," *Delph v. Smith,* 354 Mich. 12, 16, 91 N.W.2d 854 (1958). This Court has observed that "[t]he burden of proof to show non-service is upon the party attacking the jurisdiction of the court" and that the "mere denial of such service by that party is insufficient." *James v. James,* 57 Mich.App. 452, 454, 225 N.W.2d 804 (1975). The evidence required to impeach an otherwise-regular proof of service must be unequivocal, clear, and convincing, *Garey,* 234 Mich. at 678, 209 N.W. 116, and an individual's denial of service must be accompanied by "substantial corroboration" in order to overcome the presumption of proper service, *Alpena Nat'l Bank v. Hoey,* 281 Mich. 307, 312-313, 274 N.W. 803 (1937). The bare testimony of the individual attacking the court's jurisdiction is generally insufficient to impeach an otherwise-regular proof of service. See *Garey,* 234 Mich. at 677, 209 N.W. 116; *James,* 57 Mich.App. at 454, 225 N.W.2d 804.

Here, the Petitioners merely deny service without providing the Commission with "unequivocal, clear, and convincing" evidence to support their claim. Accordingly, because the Petitioners have failed to meet the evidentiary hurdle required to contest a proof of service that is "regular on its face," the Commission rejects this argument.

In any event, the Petitioners fail to explain how the alleged service deficiency has affected the outcome of the proceeding. The Commission's docket file contains both the Petitioners' and Encana's filings on the Petitioners' petition to intervene. The filing of additional pleadings by either of the parties is not provided for in R 460.17201, R 460.17203, or R 460.17205. Moreover, even a cursory examination reveals that R 460.17201, R 460.17203, and R 460.17205 contemplate that petitions for intervention should precede administrative adjudications. Nothing in those rules supports the Petitioners' efforts to intervene as of right (or at all) after the Commission has already issued a final order.

Next, the Petitioners argue that they were not apprised of the date and time of the Commission meeting in advance, and that this lack of notice prevented their attorney from making it to the Commission meeting during which the order denying their petition was issued. As a preliminary matter, a distinction must be drawn between an evidentiary hearing held before an administrative law judge (ALJ) and a public meeting of the Commissioners scheduled solely for the purpose of issuing final orders pursuant to the Open Meetings Act, MCL 15.261 *et seq*. Significantly, the public meeting that the Petitioners allude to in their motion was actually a regular Commission meeting during which orders deciding matters pending before the Commission are formally issued, not an evidentiary proceeding conducted by an ALJ. Although regular Commission meetings provide an opportunity for public comment at the close of the meeting, they are not evidentiary hearings during which testimony is taken, exhibits are entered into the record, and parties are entitled to present legal arguments before a decision is rendered. Rather, in the case of matters addressed to the Commissioners for resolution, such as the Petitioners' petition to intervene, arguments are presented in paper form, and the Commission reaches a decision on those filings in advance of the regular meeting during which Commission orders are signed and issued. The Legislature has exempted the Commission from public deliberations of its decisions and orders. *See*, MCL 15.263(7)(f). Thus, the Petitioners were not deprived of an opportunity to argue and present evidence regarding their petition to intervene because neither their attendance at nor their absence from the April 16 Commission meeting would have altered the outcome.

Notwithstanding this important distinction, an agenda for all Commission meetings is routinely posted at the Commission's offices, on the Commission's website, and routinely electronically mailed to subscribers at least 18 hours in advance of the meeting time, thus giving interested persons adequate notice of the meeting agenda ahead of time. Here, the Commission's

normal procedure for notifying interested persons of the Commission's meeting agenda was followed. Accordingly, the Petitioners were not deprived of notice of the Commission meeting agenda.

Finally, the Petitioners take issue with the lack of communication between the Commission and the Petitioners regarding the status of their petition to intervene while it was pending before the Commission. The Commission's procedures for determining and evaluating Act 9 pipeline construction requests have withstood the test of time notwithstanding any legal challenges to the contrary. Here, the Petitioners fail to identify any irregularity in Commission procedure. The fact that the Petitioners have even raised these notice and communications arguments evidences their misunderstanding concerning the practice and procedure before the Commission.

Standing

The Petitioners correctly note that, in the Commission's April 16 order denying their petition to intervene, the Commission cited federal standing precedent rather than recent Michigan standing decisions, such as *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). It has been the Commission's longstanding approach to apply the federal doctrine of standing set forth in *Association of Data Processing Services Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970) in matters pending before it. Yet, the Commission is also aware that, in recent years, Michigan jurisprudence has departed from its former adoption of the federal standing doctrine, which the state's courts previously deemed co-terminous with its own doctrine of standing. Here, regardless of whether the Commission were to again rely upon the federal doctrine of standing as it has traditionally done, or adopt the standard the Michigan Supreme Court articulated in *Lansing Schools Ed Ass'n* within the last few years, the

end result is the same. The Petitioners have no standing to intervene in this Act 9 pipeline construction matter.

The Petitioners fail to satisfy the doctrine of standing set forth in *Lansing Schools Ed Ass'n* in part because no statute over which the Commission has jurisdiction creates a cause of action that allows for the protection of the state's endangered birds, its natural resources, or the environment generally.[2] Significantly, the Commission is not a court of general jurisdiction authorized to construe, enforce, or apply state or federal environmental law, but a creature of statute with limited jurisdiction.[3] The Petitioners also lack standing because there is no indication that they have suffered any special injury or that they have a substantial interest or right that sets them apart from the general citizenry of the state of Michigan.[4] All residents in Michigan may choose to walk through or recreate in the state lands over which the proposed pipelines may traverse. Although the Petitioners' residences may be located in closer proximity to the route than some other residents' homes within the state, this factor alone does not confer standing to intervene. Further, the gravamen of the Petitioners' claims that there may be adverse effects on the environment or to the state's wildlife in the future should the Commission approve the project appears speculative in nature and does not identify a concrete injury in fact. Thus, even were the Commission to conclude that broad environmental interests are within the zone of interests that Act 9 was

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[2]Although the Michigan Environmental Protection Act, MCL 324.1701(1), expressly confers standing, Act 9 does not.

[3]*See Union Carbide Corp v Public Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988), in which the Michigan Supreme Court noted that the Commission has no inherent or common law powers. *See also*, *Telephone Association v Public Service Comm*, 210 Mich App 533, 539; 534 NW2d 194 (1995), in which the Michigan Court of Appeals acknowledged that the Commission is a creation of the Legislature, possessing only the authority specifically granted to it by statute.

[4]To the extent that the Petitioners rely on *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280, 300; 792 NW2d 686 (2010) for the proposition that recreational use of an area confers standing, we note that the test for standing identified in *Nestlé* was overruled by *Lansing Schools Ed Ass'n, supra*.

designed to protect, the absence of any special, concrete, or discernible injury bars intervention. Accordingly, it is evident that, under either the federal or state standing doctrines, the Petitioners may not intervene.

Moreover, despite the Petitioners' assertion that modern law has "overtaken" Act 9, the Commission is required to apply the law as written. Amendments or additions to the Act must come from the Legislature. The Commission lacks the authority to amend the Act or to expand its reach simply because the Petitioners ask it to. Similarly, contrary to the Petitioners' argument that the Michigan Environmental Protection Act "imposes a duty on the state and on agencies like this commission to consider the likely environmental effects of the proposed conduct," the Commission lacks statutory authority to enforce that law or other environmental laws. Further, the Petitioners have failed to identify any specific duties that the law imposes on the Commission.

The Petitioners also argue that the Commission Staff's (Staff) failure to investigate Encana's environmental impact assessment (EIA), as compared to the Staff's independent environmental review in Case No. U-9138, warrants reconsideration and approval of the petition. Having reviewed the matter, we conclude that there was no legal error or other basis to warrant reversal of our initial decision denying the Petitioners intervention.

Although the Petitioners are correct that, in Case No. U-9138, the Staff conducted its own environmental review in order to conclude that construction would not constitute a "major site activity," that case has no bearing on the matter presently before the Commission. Moreover, the Petitioners cite no legal authority to support their assertion that, because the Staff conducted an independent review of an issue in one Act 9 pipeline case, it must do so in each case. The criteria that the Commission is statutorily authorized to consider in an Act 9 pipeline construction application includes the map of the proposed line, the route, the type of construction and the

necessity and practicability of the pipeline so that the Commission may determine whether the proposed construction serves the convenience and necessity of the public. MCL 483.109.

Here, the Petitioners have chosen the wrong forum in which to bring their claims. If they want to protect the natural habitats of the Kirtland's warbler or other wildlife from diminution, or protect the environment from forest fragmentation, they need to file a lawsuit in a court with proper jurisdiction to consider the issues. The Commission is unable to grant the Petitioners' motion for reconsideration because they have chosen the wrong forum in which to seek redress.

THEREFORE, IT IS ORDERED that the petition for rehearing filed by Daniel Bonamie and John Buggs is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

John D. Quackenbush, Chairman

By its action of June 28, 2013.

Orjiakor N. Isiogu, Commissioner

Mary Jo Kunkle, Executive Secretary

Greg R. White, Commissioner

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-17196

County of Ingham)

Sharron A. Allen being duly sworn, deposes and says that on June 28, 2013 A.D. she served a copy of the attached Commission order by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.

Sharron A. Allen

Subscribed and sworn to before me
this 28th day of June 2013

Gloria Pearl Jones
Notary Public, Ingham County, MI
My Commission Expires June 5, 2016
Acting in Eaton County

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