

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of )  
**ENBRIDGE ENERGY, LIMITED PARTNERSHIP,** )  
for 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 Commission’s Rules of Practice )  
and Procedure, R 792.10447, or the grant of other )  
appropriate relief. )  
\_\_\_\_\_ )

Case No. U-20763

At the June 30, 2020 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman  
Hon. Daniel C. Scripps, Commissioner  
Hon. Tremaine L. Phillips, Commissioner

**ORDER**

History of Proceedings

On April 17, 2020, Enbridge Energy, Limited Partnership (Enbridge), filed an application and supporting exhibits pursuant to 1929 PA 16, MCL 483.1 *et seq.* (Act 16), and the Commission’s Rules of Practice and Procedure, Mich Admin Code, R 792.10447 (Rule 447) requesting that the Commission grant Enbridge the authority for its project known as the Straits Line 5 Replacement Segment (Line 5 Project), which involves constructing a replacement segment of the Line 5 pipeline (Line 5) that crosses the Straits of Mackinac (Straits). In the alternative, Enbridge

requests a declaratory ruling confirming that it already has the requisite authority to construct the Line 5 Project pursuant to the March 31, 1953 order in Case No. D-3903-53.1 (1953 order).

In its application, Enbridge explains that Line 5 was constructed by Lakehead Pipe Line Company (Lakehead)<sup>1</sup> in 1953 and that it is a 645-mile interstate pipeline that traverses Michigan's Upper and Lower peninsulas, originating in Superior, Wisconsin, and terminating near Sarnia, Ontario, Canada. Enbridge states that Line 5 was built to transport light crude oil, light synthetic crude oil, light sweet crude oil, and natural gas liquids (NGLs) volumes. Enbridge asserts that "[s]pecifically, Line 5 delivers NGLs to a facility at Rapid River in Michigan. At the Rapid River facility, much of the NGLs deliveries are converted to propane which is then distributed to heat homes and power industry in the Upper Peninsula. The non-propane NGLs component is then re-injected back into Line 5 and delivered to a Sarnia, Ontario facility for further processing." Application, pp. 5-6.

In addition, Enbridge explains that:

In the Lower Peninsula, Line 5 accepts Michigan light crude oil production at Lewiston, where Line 5 interconnects with another pipeline system. Line 5 also delivers crude to the Marysville Crude Terminal that connects with a third-party pipeline, that then transports crude from the Marysville Crude Terminal to refineries in Detroit and Toledo. These refineries produce petroleum products, including gasoline and aviation fuels used by consumers in Michigan and surrounding regions. Line 5 light crude is also delivered to the Sarnia area, including local Sarnia refineries. A portion of the volume is delivered to Enbridge's Sarnia terminal, where the crude is injected into pipelines that deliver to refineries in New York and elsewhere. Line 5 also delivers NGLs to a facility in Sarnia, where it is converted to propane for both local consumption and to be imported back to Michigan to meet Michigan's needs.

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<sup>1</sup> Enbridge states that, in 1991, Lakehead transferred Line 5 to Lakehead Pipe Line Company, Limited Partnership, which changed its name to Enbridge Energy, Limited Partnership, in 2002. Enbridge's reply comments, p. 4.

*Id.*, p. 6. Enbridge states that Line 5 has an annual average operational capacity of 540,000 barrels per day (bpd) and that the Line 5 Project will not impact the annual average operational capacity.

Enbridge avers that, where Line 5 crosses the Straits, it currently consists of two, 20-inch-diameter pipes referred to as the Dual Pipelines. Enbridge states that, pursuant to the Line 5 Project, the Dual Pipelines will be replaced with a single, 30-inch-diameter pipe, which will be located within a concrete-lined tunnel beneath the lakebed of the Straits.<sup>2</sup> Enbridge explains that:

The purpose of the Project is to alleviate an environmental concern to the Great Lakes raised by the State of Michigan relating to the approximate four miles of Enbridge's Line 5 that currently crosses the Straits of Mackinac ("Straits"). Line 5 is a fully operational 645-mile interstate pipeline, and the approximate four-mile segment that crosses the Straits lies on top of the lakebed with the exception of portions buried near each shoreline. The Project involves relocating underground the portion of Line 5 that crosses the Straits, within a tunnel to be located at a depth of approximately 60 feet to 250 feet beneath the lakebed of the Straits.

Application, pp. 1-2. Enbridge asserts that, because the pipeline will be located in a tunnel deep beneath the lakebed, the aquatic environment will be protected from the unlikely possibility of a release of liquid petroleum caused by a vessel anchor strike or some other event.

Enbridge states that it entered into a series of agreements with the State of Michigan relating to, and facilitating, the relocation of the Line 5 pipe segment within the tunnel. Enbridge also notes that the Michigan Legislature enacted 2018 PA 359 (Act 359), which created a state authority known as the Mackinac Straits Corridor Authority (MSCA), and delegated to the MSCA authority to enter into agreements pertaining to the construction, operation, and maintenance of the

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<sup>2</sup> Enbridge notes that the construction of the tunnel is the subject of separate applications before other state and federal agencies.

tunnel to house the replacement pipe segment.<sup>3</sup> Enbridge explains that its request for Commission approval of the Line 5 Project does not include approval for construction of the tunnel because “[t]he tunnel will be designed, constructed, and maintained pursuant to the ‘Tunnel Agreement’ entered between the MSCA and Enbridge pursuant to Act 359.” *Id.*, p. 3. Enbridge states that the tunnel will be constructed in the subsurface lands beneath the lakebed of the Straits within the easement issued by the Michigan Department of Natural Resources (MDNR) to the MSCA, and pursuant to the assignment of certain rights under that easement by the MSCA to Enbridge. Enbridge contends that the tunnel will be constructed in accordance with all required governmental permits and approvals.

In addition to constructing the pipe segment, Enbridge seeks Commission approval to operate and maintain the replacement pipe segment as part of Line 5. Enbridge states that it:

proposes to tie-in, operate, and maintain approximately 0.4 to 0.8 miles of pipe to connect the replacement pipe segment to Enbridge’s existing Line 5 on both sides of the Straits. The Project will also include all the associated fixtures, structures, systems, coating, cathodic protection and other protective measures, equipment and appurtenances relating to the replacement pipe segment and connection to the existing Line 5 pipeline on both sides of the Straits.

Application, p. 2. Enbridge asserts that once the pipe segment is placed into service within the

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<sup>3</sup> On October 31, 2019, the Michigan Court of Claims held that Act 359 is constitutional and confirmed the validity and enforceability of various agreements relating to the tunnel. *Enbridge Energy, Ltd Partnership v Michigan*, Case No. 19-000090-MZ (Oct. 31, 2019). The Michigan Department of Attorney General (Attorney General) filed an appeal and the Michigan Court of Appeals affirmed the Michigan Court of Claims’ order in *Enbridge Energy, Ltd Partnership v Michigan*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2020) (Docket No. 351366).

tunnel, service on the Dual Pipelines will be discontinued.<sup>4</sup>

Pursuant to the requirement in Rule 447(2)(b), Enbridge states that the municipalities affected by the Line 5 Project are Wawatam Township in Emmet County, Michigan and Moran Township in Mackinac County, Michigan. Enbridge avers that Line 5 is already located and operating in these townships. Enbridge also states that, to complete the tunnel and the Line 5 Project, nearly two million labor staff-hours will be required and “[t]he average construction workforce will consist of approximately 200 workers including construction and inspection personnel. In addition, the construction contractor has committed to utilizing Indigenous Peoples for at least 10 percent of the total operating engineering and labor staff-hours worked.” Application, p. 13. Enbridge asserts that tunnel construction and the Line 5 Project may benefit the local economy as a result of the subcontracting opportunities and money spent by workers on local housing, food, fuel, and other items. Finally, Enbridge states that, pursuant to the requirement in Rule 447(2)(f), there are no utilities rendering the same type of service with which the Line 5 Project is likely to compete.

In conclusion, Enbridge requests that, to the extent required by law, the Commission issue an order approving Enbridge’s Act 16 application for the Line 5 Project. However, Enbridge states that, “[a]s an alternative to approving the Project, the Commission should determine that approval is not necessary because the Commission’s 1953 approval of the construction, operation, and maintenance of Line 5 between the Wisconsin and Canadian borders embraces approval of the

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<sup>4</sup> Decommissioning of the Dual Pipelines will be executed pursuant to the “Third Agreement between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P.,” and the 1953 Straits of Mackinac Pipe Line Easement (1953 easement) that is administered by MDNR, which authorizes the Dual Pipelines to be located within the Straits. Application, p. 3.

replacement of one approximate four-mile segment of Line 5.” *Id.*, p. 15. Accordingly, Enbridge requests a declaratory ruling pursuant to Section 63 of the Administrative Procedures Act of 1969 (APA), MCL 24.263, and the Commission’s Rules of Practice and Procedure, Mich Admin Code, R 792.10448 (Rule 448) or other finding, that Enbridge already has the requisite authority needed from the Commission to complete the Line 5 Project based on the grant of authority for Line 5 on page 9 of the 1953 order. Enbridge also cites *Lakehead Pipe Line Co v Dehn*, 340 Mich 25; 64 NW2d 903 (1954), which it claims recognizes that Enbridge’s predecessor, Lakehead, had “sought and obtained the approval of the commission for its proposed pipe line across the State.” *Id.*, p. 41.

Enbridge requests a prompt decision so that the replacement pipe segment may be put into operation as soon as the tunnel is completed. Moreover, Enbridge states that it is important that the Commission promptly resolve its request so that the concerns of the State of Michigan, as well as the public’s concerns, regarding the continued operation of the Dual Pipelines are timely addressed.

On April 22, 2020, the Commission issued an order in this case seeking “additional input on the threshold issue presented in the declaratory ruling request under Rule 448 before proceeding with the Act 16 application through a contested case process.” April 22, 2020 order in Case No. U-20763 (April 22 order), p. 2. The Commission also decided to hold Enbridge’s application in abeyance while it considered the request for a declaratory ruling. In the April 22 order, the Commission established a comment period that was specifically limited to comments providing “a legal analysis of the issues presented in the request for a declaratory ruling, including references to statutes, rules, and prior Commission orders to which the request relates and an analysis of their

applicability to the Line 5 Project in terms of characteristics.” *Id.*, p. 3. Initial comments were due on May 13, 2020, and reply comments were due on May 27, 2020.

### Initial Comments

The Commission received thousands of comments from members of the public and interested groups expressing concern about the long-term safety, durability, and potential environmental, health, and community impacts of the Line 5 Project. In addition, many commenters assert that the Line 5 Project does not provide energy security for Michigan and conflicts with the Michigan Department of Environment, Great Lakes, and Energy’s (EGLE’s) 2030 program to reduce Michigan’s dependence on fossil fuels. The Commission also received a multitude of comments in support of the Line 5 Project. The Commission has reviewed these comments and finds that they focus on the merits of the Act 16 application but fail to address Enbridge’s request for declaratory relief and do not present a legal analysis of the request for declaratory relief. Therefore, those comments will not be addressed in this order.

On May 12, 2020, the Michigan Environmental Council, the Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, and the National Wildlife Federation (collectively, Environmental and Tribal Groups) timely filed comments opposing Enbridge’s request for declaratory relief. They claim that Enbridge’s request is: (1) unsupported by a specific legal analysis; (2) unsupported by the facts in the application; and (3) not appropriate for a declaratory ruling under longstanding Commission precedent. In addition, the Environmental and Tribal Groups assert that Enbridge’s claim that the Line 5 Project does not require Commission approval is contrary to the plain language of Act 16 and conflicts with the representations Enbridge made during the development of its 2018 agreements with the State of Michigan for the Line 5 Project.

Regarding Enbridge's request for declaratory relief, the Environmental and Tribal Groups disagree that Enbridge has the requisite legal authority to construct the Line 5 Project pursuant to the 1953 order, the May 29, 1953 order in Case No. D-3903-53.2 (1953 supplemental order) (jointly, 1953 orders), and the 1953 easement. The Environmental and Tribal Groups note that "the 1953 Order specifically approved construction of a 10-mile-long, 20-inch-diameter pipe across the bottom of the Straits – identifying it separately from the 630-mile-long, 30-inch pipe over the rest of the route . . . ." Environmental and Tribal Groups' initial comments, p. 11 (footnotes omitted). They argue that, by contrast, the Line 5 Project involves the construction of a 30-inch-diameter pipe, to be housed in a tunnel deep beneath the lakebed of the Straits. And, according to the Environmental and Tribal Groups, Enbridge admits that the Line 5 Project will not be constructed within the 1953 easement. *Id.*, p. 13.

The Environmental and Tribal Groups also note that, when the Commission approved Line 5 in the 1953 order, the operational capacity was 300,000 bpd. However, they state that the annual average operational capacity for Line 5 is now 540,000 bpd. *Id.*, p. 11. Although Enbridge claims that the Line 5 Project will not impact the annual average operational capacity, the Environmental and Tribal Groups point out that it has almost doubled from what was approved by the Commission in 1953. Furthermore, they assert that Enbridge failed to provide facts in its application stating the maximum capacity of the Line 5 Project; they argue that it could be "an even larger increase from the operational capacity approved in the 1953 Orders." *Id.*, p. 12.

The Environmental and Tribal Groups note that, two months after the Commission issued the 1953 order, Lakehead filed a supplemental petition in Case No. D-3903-53.2 requesting authority to modify Line 5. They state that, in the 1953 supplemental order in Case No. D-3903-53.2, the Commission found that Lakehead's proposed modifications to Line 5 did not require the filing of



an Act 16 application. According to the Environmental and Tribal Groups, if the 1953 supplemental order is compared to Enbridge's application in this case, it demonstrates that Enbridge is required to file an Act 16 application for approval of the Line 5 Project. First, they note that, in the 1953 supplemental order, the Commission found that Lakehead was not seeking to change the route of Line 5 and, therefore, did not need to file an Act 16 application. The Environmental and Tribal Groups assert that, in this case, Enbridge is requesting a change in route because the Line 5 Project requires new pipe segments and connectors and a new easement. Second, the Environmental and Tribal Groups contend that, in the 1953 supplemental order, the Commission found that Lakehead's proposed modification to Line 5 was a change in engineering design, which did not warrant the filing of an Act 16 application. In comparison, the Environmental and Tribal Groups assert that the issues in Enbridge's application "are not simply a matter of engineering design. They involve a \$500 million construction project; substantial risks; weighty policy questions; and a 99-year commitment of State-owned real property to support fossil fuel infrastructure." *Id.*, p. 10. Third, they assert that, in the 1953 supplemental order, the Commission found that it was unnecessary to conduct a public hearing to determine that a change in engineering design is in the public interest. However, the Environmental and Tribal Groups aver that the public interest in this case cannot be protected without a contested case: important policy matters, the protection of Tribal treaty rights, and the applicant's record of pipeline failures and pollution must be adjudicated with comprehensive evidence and a complete record.

In addition, the Environmental and Tribal Groups contend that the 1953 orders do not provide Enbridge the authority to construct the Line 5 Project because there have been significant changes in law and regulatory policy since the 1953 orders were issued. They assert that: (1) the Michigan Environmental Protection Act, MCL 324.1701 *et seq.* (MEPA) had not been enacted when the

1953 orders were issued; (2) the Commission's standards for examining Act 16 applications have changed since the 1953 orders were issued; and (3) the 1953 orders did not involve tribal consultation or contemplation of the Tribes' rights.

Furthermore, the Environmental and Tribal Groups state that the Commission has denied requests for declaratory relief when there is ongoing litigation.<sup>5</sup> They assert that "the permit for Enbridge's tunnel has yet to be finalized," which "is a condition precedent to Enbridge's request for declaratory relief, [and therefore] the Commission would be departing from precedent" if it were to grant the request. *Id.*, p. 19 (footnote omitted). The Environmental and Tribal Groups also aver that the Commission has found that "declaratory rulings are inappropriate where the

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<sup>5</sup> The Environmental and Tribal Groups cite page 3 of the October 27, 2015 order in Case No. U-17962, wherein the Commission denied Consumers Energy Company's (Consumers') request for a declaratory ruling because the relief sought was already at issue in a formal complaint pending in another case and was to be addressed in that docket. They also cite page 2, note 1 in the August 14, 1995 order in Case No. U-10833, wherein the Commission denied Holland Board of Public Works' request for declaratory relief because a pending contested case addressed the same issues.

questions raised by the request are complex and important or implicate broad policy . . . .”<sup>6</sup> *Id.*

Therefore, the Environmental and Tribal Groups contend that Enbridge’s request for declaratory relief should be denied pursuant to Section 63 of the APA and Rule 448 because the Line 5 Project is a major relocation of pipeline, it involves substantially more than the replacement of small portions of pipeline, it will not be located within the same easement as Line 5, and Enbridge’s legal analysis fails to demonstrate that the continued operation of Line 5 is in the public interest. Accordingly, they argue that the Line 5 Project is a significant departure from the 1953 easement and the Commission’s approvals in the 1953 orders and, therefore, Enbridge does not have the requisite authority to construct the Line 5 Project pursuant to the 1953 orders or the 1953 easement.

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<sup>6</sup> The Environmental and Tribal Groups cite several cases in support. On page 1 of the October 11, 2001 order in Case No. U-12979, the Commission denied The Detroit Edison Company’s request for a declaratory ruling related to the Commission’s jurisdiction over the interconnection of distribution equipment owned by the utility and another company and the treatment of retail power consumption at an industrial complex because, “in light of the importance and complexity of the issues . . . the questions raised by the request would be better addressed in a contested case proceeding . . . .” On page 1 of the October 11, 2001 order in Case No. U-13117, the Commission denied Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems’ request for a declaratory ruling that their tariffed access rates are in compliance with the Michigan Telecommunications Act, MCL 484.2101 *et seq.*, because “in light of the importance and complexity of the issues . . . the questions raised by the request would be better addressed in a contested case proceeding . . . .” On page 12 of the September 26, 2006 order in Case No. U-14702, the Commission denied Michigan Environmental Council’s and Public Interest Research Group in Michigan’s motion for a declaratory ruling that a proper power supply cost recovery plan and five-year forecast should include resource planning and implementation of energy conservation, energy efficiency, and/or demand-side management programs and strategies because the request involved “broad policy” and the case was “an especially inappropriate setting for a declaratory ruling.” On page 4 of the April 27, 2010 order in Case No. U-16190, the Commission found that Muskegon Development Company’s request that the Commission should not approve exceptions to the Rules for the Production and Transmission of Natural Gas, R 460.867, was not appropriate for a declaratory ruling because the request involved “issues of first impression that are likely to establish important and potentially controlling precedent for many producers of natural gas from Antrim Shale Formation gas well.”

Next, the Environmental and Tribal Groups contend that Act 16 and Rule 447 require a corporation to seek Commission approval if it needs to construct facilities to transport petroleum, which would include the replacement and relocation of a pipeline. They assert that Act 16 provides the Commission “broad authority over oil pipelines and all fixtures and equipment used in connection with them” and it “includes no exemption from regulation for new or re-located pipeline segments.” *Id.*, p. 6. In addition, the Environmental and Tribal Groups disagree with Enbridge that “Rule 447’s plain language does not require petroleum pipeline operators to file applications for replacement projects that maintain or allow safer operation of their existing utility facilities.” *Id.*, p. 12, quoting Application, p. 17 (footnote omitted). They assert that Enbridge’s proposal to replace the Dual Pipelines with a 30-inch-diameter pipe to be relocated within a tunnel deep beneath the lakebed is not a simple, maintenance-based replacement of small portions of pipeline to allow safer operations. Thus, the Environmental and Tribal Groups argue that, pursuant to Act 16 and Rule 447, Commission approval of the Line 5 Project is required.

Moreover, the Environmental and Tribal Groups state that:

under the plain text of Rule 447, if the tunnel that will house the replacement pipe is a facility to transport petroleum products, then Enbridge must apply for Commission approval to construct it. Further, Act 16 includes “fixtures and equipment belonging to, or used in connection with” pipelines within the scope of facilities the Commission is charged to regulate. Act 16 similarly requires Commission approval to “locate, maintain, or operate pipe lines, fixtures or equipment appurtenant thereto.” It is beyond reasonable debate that the tunnel is a fixture used in connection with a pipeline and appurtenant thereto.

Environmental and Tribal Groups’ initial comments, p. 13 (footnotes omitted). In the opinion of the Environmental and Tribal Groups, the tunnel is an inextricable part of the Line 5 Project, subject to the Commission’s jurisdiction and authority under Act 16, and within the scope of this case.

In conclusion, the Environmental and Tribal Groups request that the Commission deny Enbridge's request for declaratory relief, set this matter for a contested case proceeding, and determine that the tunnel is part of the Line 5 Project, that it is within the scope of this case, and that it requires Commission approval.

On May 12, 2020, Dennis and Kim Ferraro timely filed comments opposing Enbridge's request for declaratory relief. Mr. and Mrs. Ferraro state that they adopt and incorporate by reference the Attorney General's pending complaint filed against Enbridge, which alleges that the 1953 easement was void at its inception and is thus unenforceable. Mr. and Mrs. Ferraro argue that, even if it is assumed that the 1953 easement is valid, the Line 5 Project is not compatible with the 1953 easement. In addition, Mr. and Mrs. Ferraro claim that "because Enbridge has repeatedly and substantially breached and violated its terms and covenants, Michigan contract law and principles of Equity[,] with which the MPSC [Michigan Public Service Commission] is charged, now bar Enbridge from seeking enforcement of that Easement." Mr. and Mrs. Ferraro's initial comments, p. 3. Finally, Mr. and Mrs. Ferraro request that the Commission defer its decision regarding Enbridge's request for declaratory relief until the pending appeals and complaints by the Attorney General and the investigation by MDNR are complete.

On May 13, 2020, Enbridge timely filed comments in support of its request for declaratory relief. In its comments, Enbridge reiterates the arguments set forth in its application, which state that the Line 5 Project is routine maintenance, a replacement of a small segment of Line 5 that crosses the Straits, and that Enbridge has the requisite authority pursuant to the 1953 order to construct the Line 5 Project. If the Commission determines that Act 16 approval of the Line 5 Project is necessary, Enbridge requests that the Commission "not conduct a contested case hearing

and should, instead, grant *ex parte* approval of Enbridge’s application in order to advance the established policy of the State of Michigan . . . .” Enbridge’s initial comments, p. 3.

Enbridge asserts that, once an entity has obtained Act 16 approval to construct a pipeline, historically, the Commission has not required it to obtain additional Act 16 approval when repairing, maintaining, or relocating existing facilities. According to Enbridge, the Line 5 Project is a simple replacement and relocation of Line 5 in the Straits to ensure that the operation of the pipeline is safer and consistent with the State of Michigan’s policy goals. *Id.*, p. 2. Enbridge argues that the Line 5 Project does not alter the route of Line 5, it does not alter the nature of the service provided by Line 5, it does not alter the annual average capacity of Line 5, and it does not change or create any new receiving or delivery points along Line 5.

Enbridge claims that, if Rule 447 is broadly interpreted to require applications for all pipeline activity, including modifying, maintaining, replacing, or relocating an existing pipeline or electric facility, it will conflict with Subsection (2)(c) of Rule 447. Enbridge contends that Rule 447 should be read as a whole and, when reviewed in its entirety:

it is unambiguous that the type of construction requiring an application pursuant to Section (1) is the type of construction that relates to “service to be furnished” in the future[,] but not yet in service[,] as set forth in Subsection (2)(c) and service that falls within the meaning of “new construction or extension” as set forth in Subsection (2)(d) [sic: (2)(e)] and at least has the potential to cause competition with other utilities identified in Section (3).

Enbridge’s initial comments, pp. 14-15. Enbridge also argues that it is unreasonable to conclude that the term “new construction” in Rule 447(2)(e) applies to the modification, maintenance, replacement, or relocation of an existing facility.

Furthermore, Enbridge asserts that the phrase “new construction or extension” in Rule 447(2)(e) is limited to construction of a new pipeline or extension of an existing pipeline that will provide service for the first time in an area. Enbridge claims that this is “supported by the

unambiguous language of Subsection (2)(b) [sic: (2)(c)], which requires that the application include a description of ‘the nature of the utility **service to be furnished.**’ (emphasis supplied).” *Id.*, p. 16. According to Enbridge, the phrase “to be” refers to service provided in the future, not existing service, and therefore cannot apply to an existing pipeline such as Line 5.

Moreover, Enbridge asserts that, when Section (3) of Rule 447 is read in conjunction with Sections (1) and (2), it is clear that Rule 447 applies to new construction and extensions of pipelines that are providing new service because other utilities are permitted to intervene if the new service might compete with existing service. Enbridge contends that it would be illogical that a competing utility would need to intervene in a situation where another utility is merely replacing existing facilities already in service. *Id.*, p. 17.

Next, Enbridge explains that the continued operation of Line 5 is in the public interest. Enbridge notes that, prior to the construction of Line 5 in 1953, a party in Case No. D-3903-53.1 filed a motion to dismiss Lakehead’s application, arguing that Line 5 was not in the public interest. Enbridge contends that, on page 8 of the 1953 order, the Commission specifically found that the motion was without merit. Enbridge states that, “[s]imilarly, in *Lakehead Pipe Line Co v Dehn*, 340 Mich. 25, 37-42; 64 N.W. 2d 903 (1954), the Michigan Supreme Court rejected this argument and held that the construction and operation of Line 5 was ‘for a public use benefiting the people of the State of Michigan’ . . . .” *Id.*, p. 4. Thus, Enbridge states, the Commission and the Michigan Supreme Court have already determined that Line 5 is in the public interest.

Additionally, Enbridge asserts that the citizens of Michigan have benefitted from Line 5 for the last 67 years. Enbridge states that “Line 5 now provides vital energy transportation to meet the needs of Michigan residents,” such as propane that is used to heat homes and power industry, and gasoline and aviation fuels used by consumers in Michigan. *Id.*, p. 5.

Enbridge contends that, in order to mitigate a perceived environmental risk to the Great Lakes, the State of Michigan has made a public policy determination that the portions of Line 5 that currently cross the Straits should be relocated, operated, and maintained within a tunnel beneath the lakebed of the Straits. As a result, Enbridge states that the State of Michigan and Enbridge have entered into a series of contractual agreements that will “improve the stewardship of Line 5, evaluate potential replacement of the Dual Pipelines, and improve operations and safety criteria for other parts of Line 5 throughout the state.” *Id.*, p. 6. In addition, Enbridge notes that, in 2018, the Michigan Legislature enacted Act 359, which created the MSCA and provided the agency with 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).” *Id.*, p. 6. Accordingly, Enbridge states that it has entered into an agreement with the MSCA to construct the tunnel and replace the Dual Pipelines with the Line 5 Project to be located within the tunnel.

Enbridge notes that the MSCA acquired from MDNR an easement for the tunnel and the MSCA assigned to Enbridge certain rights under the easement to construct, operate, and maintain the tunnel for the Line 5 Project. Enbridge asserts that it has initiated separate proceedings before EGLE and the United States Army Corps of Engineers (USACE) to address permitting of the tunnel. According to Enbridge, these proceedings are more appropriate forums for the public to fully participate with suggestions for, or objections to, the construction of the tunnel.

In conclusion, Enbridge requests that the Commission grant its request for declaratory relief and find that it has the requisite authority to construct the Line 5 Project pursuant to the 1953 order. However, if the Commission denies its request for declaratory relief, Enbridge states that the Commission should not conduct a contested case and, instead, should approve its Act 16 application on an *ex parte* basis. Enbridge explains that *ex parte* approval is appropriate in this



case because the only issue in the application is not controversial: “if the Application is granted, Enbridge will (1) relocate Line 5 in a tunnel for which permits are being sought in separate proceedings at other agencies and (2) deactivate the Dual Pipelines.” *Id.*, p. 19. Enbridge concludes that if approval to build the tunnel or relocate the pipeline is not granted, it will continue to operate the Dual Pipelines.

On May 13, 2020, For the Love of Water (FLOW) timely filed comments asserting that Enbridge’s request for declaratory relief should be denied because Enbridge does not have the requisite authority to construct the Line 5 Project or the tunnel pursuant to the 1953 order, the 1953 easement, the 2018 tunnel easement, or its agreements with the State of Michigan. In addition, FLOW asserts that Enbridge must obtain Commission approval to construct the tunnel and the Line 5 Project pursuant to Act 16 and Rule 447.

FLOW states that Enbridge acknowledges that the replacement pipe segment for the Line 5 Project will not be placed within the precise location set forth in the 1953 easement. FLOW notes that the 1953 easement contains “exact longitudinal and latitudinal locations for the easterly and the westerly located Line 5 pipeline infrastructure. The 1953 MPSC Order included similar express terms and conditions about the pipeline infrastructure and location . . . .” FLOW’s initial comments, p. 6. FLOW argues that these specific locations are legally significant because, in the 1953 easement and the 1953 order, the State of Michigan granted Lakehead conditional use of its public trust lands and waters so long as the Dual Pipelines were constructed in an exact location on the lakebed floor. FLOW asserts that “[n]othing in the Commission’s 1953 Order contained approval or even consideration for the location and construction of a deep subsurface tunnel and tunnel pipeline.” *Id.*, p. 7. Therefore, FLOW argues that the 1953 order, together with the 1953 easement, does not provide Enbridge the requisite authority to construct the Line 5 Project.

FLOW also contends that “there is tremendous confusion as to the legal status of which Enbridge entity is the legal successor in interest and correct signatory to the multiple agreements at issue involving the 2018 tunnel agreement, easement, assignment, and lease agreement.” *Id.*, p. 15. FLOW states that there are multiple Enbridge entities who are parties and signatories to the agreements and, since 2018, several of these entities have merged through acquisition by another wholly owned subsidiary of Enbridge. FLOW asserts that interested parties should be provided an opportunity, through an Act 16 contested case, to obtain discovery and resolve these questions.

Next, FLOW argues that Enbridge’s agreements with the State of Michigan and the Tunnel Agreement, independent of other required permits and approvals, do not provide Enbridge the authority to construct the Line 5 Project. FLOW explains that on November 27, 2017, Enbridge and the State of Michigan entered into an agreement (First Agreement) which states, among other things, that “the State and Enbridge desire to establish additional measures and undertake further studies with respect to certain matters related to Enbridge’s stewardship of Line 5 within Michigan.” First Agreement, p. 2. Then, on October 4, 2018, FLOW states that Enbridge, the State of Michigan, MDNR, and the Michigan Department of Environmental Quality (MDEQ) (now known as EGLE) entered into an agreement (Second Agreement) wherein the Mackinac Bridge Authority (Authority) was directed to “(a) obtain or support Enbridge in obtaining the necessary permits, authorizations, or approvals necessary for the construction and operation of the Tunnel and the Line 5 Straits Replacement Segment; and (b) upon completion of the construction of the Straits Tunnel, the Authority shall assume ownership of the Straits Tunnel.” Second Agreement, p. 6. On December 19, 2018, FLOW notes that Enbridge and the MSCA entered into the Tunnel Agreement, wherein the parties agreed, among other things, that Enbridge and the MSCA will “jointly obtain all Governmental approvals and Permits required for the Tunnel.”

Tunnel Agreement, p. 1. On that same date, FLOW contends that Enbridge, the State of Michigan, MDNR, and MDEQ (now known as EGLE) entered into an agreement (Third Agreement), which states, among other things, that:

Enbridge may continue to operate the Dual Pipelines, which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is completed, and the Straits Line 5 Replacement segment is placed in service within the Tunnel, subject to Enbridge's continued compliance with all of the following:

- (a) The Second Agreement;
- (b) The Tunnel Agreement;
- (c) This Third Agreement;
- (d) The 1953 Easement; and
- (e) All other applicable laws, including those listed in Section V of the Second Agreement.

Third Agreement, p. 4.

FLOW also notes that, on December 17, 2018, an easement was granted by MDNR under Section 2129 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.2129, for the construction of the tunnel (2018 tunnel easement). Section 21 of NREPA states in relevant part:

The department may grant easements, upon terms and conditions the department determines just and reasonable, for state and county roads and for the purpose of constructing, erecting, laying, maintaining, and operating pipelines, electric lines, telecommunication systems, and facilities for the intake, transportation, and discharge of water, including pipes, conduits, tubes, and structures usable in connection with the lines, telecommunication systems, and facilities, over, through, under, and upon any and all lands belonging to the state which are under the jurisdiction of the department and over, through, under, and upon any and all of the unpatented overflowed lands, made lands, and lake bottomlands belonging to or held in trust by this state.

FLOW asserts that MDNR conveyed the 2018 tunnel easement to the MSCA and the MSCA assigned the tunnel easement to Enbridge, who will temporarily own the bottomlands and soils beneath the Straits to construct the tunnel. FLOW states that, once the tunnel is complete,

Enbridge will transfer title to the MSCA in exchange for a 99-year lease to operate and maintain the tunnel pipeline.

According to FLOW, Enbridge claims that these three agreements with the State of Michigan, together with the 2018 tunnel easement, the MSCA's assignment of the 2018 tunnel easement to Enbridge, and the 99-year-lease of the tunnel, provide it the necessary property interests to occupy the subsurface public trust bottomlands and to construct the pipeline inside the tunnel. FLOW disagrees, arguing that "the Second Agreement and Act 359 unequivocally require MSCA and/or Enbridge to apply for and obtain all authorizations, approvals, and permits for the tunnel easement to MSCA, the assignment of the easement by MSCA to Enbridge, the 99-year-lease, and for the location, use, construction, and operation of the tunnel." FLOW's initial comments, pp. 11-12. Accordingly, FLOW asserts that Enbridge must obtain Act 16 approval to construct the tunnel and the Line 5 Project.

In response to Enbridge's claim that the tunnel is not part of the Line 5 Project and, therefore, not subject to the Commission's Act 16 jurisdiction, FLOW contends that Enbridge provides the conflicting argument that the tunnel is a pipeline that qualifies for a public utility easement, i.e., the 2018 tunnel easement, under Section 2129 of NREPA. FLOW states that, for the 2018 tunnel easement to be lawful pursuant to Section 2129 of NREPA, Enbridge must concede that the tunnel is an inseparable part of the Line 5 Project. In any event, FLOW asserts that, at the time the MSCA assigned the 2018 tunnel easement to Enbridge, Enbridge had not obtained Act 16 approval for the tunnel structure or the Line 5 Project. Therefore, FLOW argues that the tunnel and the Line 5 Project are not legally approved public utilities that qualify for an easement pursuant to the plain language of Section 2129 of NREPA.

Similarly, FLOW asserts that the language in: (1) the Second Agreement; (2) the Tunnel Agreement; (3) Act 359; (4) the 2018 tunnel easement; (5) the assignment of the easement; and (6) the 99-year lease of the tunnel, indicate that the tunnel and the Line 5 Project are inseparable and a single project that constitutes new construction under Rule 447. FLOW also notes that the 0.4- to 0.8-mile tie-ins on the north and south sides of the Straits are new locations and extensions to construct the new 30-inch-diameter pipeline that will be connected to the existing Line 5 pipeline. As a result, FLOW avers that the tunnel, the Line 5 Project, and the tie-ins are a single project of new construction that requires Act 16 approval pursuant to Rule 447.

FLOW also contends that, because Enbridge “did not have MPSC approval as a public utility to locate and construct the tunnel and pipeline project under Act 16, in the closing days of 2018 it sought to quickly acquire the property interests—the tunnel easement, assignment of easement, and 99-year lease—from the MDNR under Section 2129 in the state-owned bottomlands under the Straits.” *Id.*, p. 21. However, FLOW asserts that to qualify for and acquire these property interests, Enbridge first should have, but did not, obtain Act 16 approval for the tunnel and the Line 5 Project as public utilities, which is required by Section 2129 of NREPA and the Great Lakes Submerged Lands Act (GLSLA).

FLOW argues that the 2018 easement can only be assigned to Enbridge if it is determined that the easement complies with the mandatory requirements of the common law public trust doctrine. According to FLOW:

To comply with public trust law, EGLE must factually determine that:

1. The proposed disposition, occupancy, or action predominantly serves or enhances a public trust interest or interest (such as navigation, fishing, etc.), not a private one;  
and
2. The proposed disposition, occupancy, or action will not interfere with or impair the public trust waters, soils, habitat, wildlife like fish and

waterfowl, or one or more of the public-trust uses.

*Illinois Central Rd v Illinois*, 146 U.S. 387 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 299 (1960).

*Id.*, p. 22. FLOW argues that, prior to conveying the 2018 tunnel easement to the MSCA, neither MDNR nor MDEQ (now known as EGLE) made the two findings required by the public trust doctrine.

Moreover, FLOW contends that EGLE must make a determination pursuant to the GLSLA that “the public trust in the waters will not be impaired or substantially affected,” and only then may EGLE lease unpatented lands with the approval of the state administrative board. *Id.*, p. 24, quoting MCL 324.32503. As stated above, FLOW alleges that neither MDNR nor EGLE have made findings pursuant to public trust law. FLOW notes that, in April 2020, Enbridge applied to EGLE for a construction permit for the tunnel pursuant to the GLSLA. FLOW argues that “Enbridge is not entitled to obtain authority for an easement or enter into any agreement unless it has obtained the approval of state administrative board as required by Section 32503, *supra*, of the GLSLA.” *Id.*, p. 25. In addition, FLOW states that Enbridge has not applied for, or obtained, authorization under Section 32502 of the GLSLA for the 2018 tunnel easement, the MSCA assignment of the tunnel easement, or the 99-year lease. As a result, FLOW asserts that Enbridge does not have a legally authorized property interest in the public trust bottomlands of the Straits.

In conclusion, FLOW states that there are important questions concerning the necessity of the Line 5 Project, alternatives to the project, and how the Line 5 Project affects the public interest. FLOW asserts that the Michigan Constitution, the public trust doctrine, MEPA, and impacts of climate change should shape the outcome of these questions. For these reasons and those discussed above, FLOW contends that Enbridge’s request for declaratory relief should be denied,

and “these proceedings must go forward and be addressed through the comprehensive review, analysis, and determinations by this Commission as provided by law.” *Id.*, p. 26.

On May 13, 2020, the Attorney General timely filed comments asserting that Enbridge’s request for declaratory relief should be denied. First, she disputes Enbridge’s claim that the Line 5 Project is simply maintenance and continued operation of the existing Line 5 pipeline pursuant to the 1953 order. Rather, the Attorney General states that the Line 5 Project is new construction that will be located within a new tunnel structure deep beneath the Straits. She argues that the new location “differs both horizontally from the existing dual pipelines on the lakebed . . . and vertically, i.e. up to 250 feet beneath the lakebed.” Attorney General’s initial comments, p. 5. In addition, the Attorney General asserts that it is unclear whether “Enbridge Energy Limited Partnership, one of several Enbridge entities variously involved in Line 5, is actually the legal successor to Lakehead and the authorization granted in the 1953 order.” *Id.*, p. 2, note 2. Therefore, she contends that Enbridge does not have the requisite authority pursuant to the 1953 order to construct the Line 5 Project.

Second, the Attorney General states that Act 16 and Rule 447 require Commission approval of the Line 5 Project. She asserts that, “[u]nder Act 16, no one subject to the Act, including Enbridge[,] has the right to ‘locate’ an oil pipeline within Michigan, except as authorized by and subject to the Act.” *Id.*, p. 2 (emphasis in original). The Attorney General states that, because Enbridge operates a pipeline under the requirements of Act 16 and is proposing to construct a new pipeline to transport petroleum products, pursuant to Rule 447, Enbridge is required to file an Act 16 application and obtain Commission approval of the Line 5 Project.

Third, the Attorney General contends that the Commission has previously required Enbridge to file an Act 16 application for the replacement and relocation of other pipeline segments. She

explains that, in 1968, Lakehead “submitted an application to the Commission to construct, operate and maintain a new oil pipeline in Michigan in Commission [sic] No. U-3225. . . . The Commission ultimately authorized the construction, operation and maintenance of that proposed pipeline which was designated Line 6B.” *Id.*, p. 7 (footnote omitted). The Attorney General notes that, after the Line 6B oil spill near Kalamazoo, Michigan, Enbridge filed several Act 16 applications to replace and relocate various segments of Line 6B. Although Enbridge had received prior approval for the construction, operation, and maintenance of Line 6B, the Attorney General asserts that Enbridge determined that it was necessary to apply for Act 16 approval to replace portions of Line 6B.

Fourth, the Attorney General contends that, since the original Line 5 order was approved in 1953, there have been substantial changes in the law. She asserts that, currently, pursuant to MEPA, MCL 324.1701 *et seq.*, the Commission is required to determine whether the proposed activity is likely to cause pollution, impairment, or destruction of natural resources or the public trust and, if so, whether there is a feasible and prudent alternative. The Attorney General argues that, if Enbridge’s request for declaratory relief is granted, the Commission will be unable to fulfill its duty under MEPA and relevant case law.

In conclusion, the Attorney General asserts that the Commission should deny Enbridge’s request for declaratory relief and “proceed with a full and substantive review of Enbridge’s application for authorization of the Project under Act 16, Rule 447 and other applicable law.” *Id.*, p. 10.

On May 13, 2020, the Environmental Law & Policy Center and the Michigan Climate Action Network (Environmental Coalition) timely filed comments requesting that the Commission deny Enbridge’s request for declaratory relief because: (1) the Line 5 Project is new construction, not



maintenance or continued operation under the terms of the 1953 order; (2) the prior 1953 evaluation of public need is not applicable to this new pipeline project; and (3) the Line 5 Project requires an Act 16 application and Commission approval.

The Environmental Coalition disagrees with Enbridge's claim that the replacement and relocation of the Dual Pipelines is within the scope of the 1953 order. The Environmental Coalition states that:

The Commission's 1953 Order approved a very specific pipeline in a very specific place. The 1953 Order included a recitation of the physical specifications of the pipeline, as well as an approximate map of the pipeline, to be supplemented by a detailed map after completion. The thickness of the pipe, maximum allowable working pressure, minimum cover, coating, and reinforcement are all specified in the Order, with further reference to and incorporation of Enbridge Limited Partnership's detailed 1953 application. (Ex. A-6). The Order requires a design "in accordance with conservative pipe line practices," which are practices of the 1950s. (Ex. A-3 at 6). The Opinion also references applicable Code in effect in the 1950s. (Ex. A-3 at 6). And, of course, the 1953 application was considered only in the context of state and federal laws that existed in 1953.

Environmental Coalition's initial comments, p. 2. In addition, the Environmental Coalition disputes that the Line 5 Project is simply a replacement of an existing segment of Line 5 in the same location. Rather, the Environmental Coalition argues that the Line 5 Project is a new "30-inch-diameter line in a 10-foot-diameter tunnel that the Company intends to build at a depth of 60 to 250 feet beneath the lakebed in a location approximately one half mile west of the existing pipeline." *Id.*, p. 3.

Next, the Environmental Coalition contends that the Commission must determine whether there is a public need for the pipeline and tunnel. The Environmental Coalition states that:

Enbridge Limited Partnership claims that the Commission, in 1953, found that the construction, operation and maintenance of Line 5 was in the public interest, and that the segment under the Straits would serve the public interest, including in times of national emergency. (Application at 15). Enbridge seeks to freeze that determination and transport it forward in time forever. That 1953 determination of

the public interest did not have the benefit of 67 years of accumulated knowledge regarding the Great Lakes.

*Id.*, p. 8. The Environmental Coalition argues that the public's concern for ecology, environment, tourism, and local economies has changed since 1953 and that the Commission should review Enbridge's Act 16 application to determine whether the Line 5 Project is in the public interest under today's standards.

In addition, the Environmental Coalition avers that, pursuant to Act 16, the Line 5 Project is new construction and Enbridge is required to file an Act 16 application and obtain Commission approval of the project. According to the Environmental Coalition, the Commission implements Act 16 through Rule 447, which states that "a corporation, association, or person conducting [sic] oil pipeline operations within the meaning of Act 16 must file an application with the commission for the necessary authority to do so." *Id.*, p. 5; Rule 447(1)(c). Furthermore, the Environmental Coalition contends that *Dehn* defines the scope of the Commission's authority to regulate pipelines under Act 16: "In *Dehn*, the Michigan Supreme Court found that Act 16 granted the Commission authority to review and approve proposed pipelines, and to place conditions on their operations, and that the legislative basis for Act 16 was to ensure that Commission authority was exercised 'for a public use benefitting the people of the State of Michigan.' *Id.* at 910." Environmental Coalition's initial comments, p. 4. The Environmental Coalition asserts that an Act 16 application is appropriate in this case because the Line 5 Project involves construction of a new pipeline in a new location, it differs physically and legally from the project approved in the 1953 order, and the Commission routinely requires Act 16 applications for much smaller projects.

In conclusion, the Environmental Coalition asserts that Enbridge's request to construct a new pipeline and tunnel deep beneath the lakebed of the Straits is not authorized by the 1953 order and may be contrary to the public interest. Therefore, the Environmental Coalition requests that the

Commission deny Enbridge's request for declaratory relief and, instead, consider Enbridge's Act 16 application.

On May 13, 2020, the Michigan Resource Stewards (MRS) timely filed comments opposing Enbridge's request for declaratory relief. MRS contends that the Line 5 Project replaces the old, deteriorating Dual Pipelines with a newly designed, newly constructed, and relocated pipeline, which does not qualify as maintenance of the existing Line 5. MRS also states that the 1953 order did not contemplate current conditions, natural resource sensitivity, case law, pipeline routing, public interest, and safety. Furthermore, MRS argues that "a declaratory ruling . . . would override the MPSC's statutory authority under Act 16 to review and make a decision on public need, pipeline routing, and safety; especially in such a controversial and complex project of such widespread Michigan citizen concern." MRS's initial comments, p. 1. Finally, MRS asserts that the tunnel should be considered part of the Line 5 Project:

[T]he tunnel is in fact a pipeline itself. Differently from a vehicular tunnel, whose purpose is to keep water out for safe and efficient movement of traffic under a water barrier; the Straits pipeline tunnel will not only be designed to keep water out but also to keep spilled oil contained and away from public waters. Thus the tunnel should itself be considered an integral component of the pipeline and co-regulated by the Commission and the Mackinac Straits Corridor Authority since the Authority may lack sufficient authority, expertise and responsibility to properly regulate and oversee construction and operation of the tunneled pipeline.

*Id.*, p. 2.

On May 13, 2020, Senator Jeff Irwin filed comments opposing the Line 5 Project and Enbridge's request for declaratory relief. Senator Irwin disputes that Enbridge has the requisite authority to construct the Line 5 Project pursuant to the 1953 order, contending that it is unreasonable to conclude that the original application filed 67 years ago applies to the type of construction proposed for the Line 5 Project. Senator Irwin states that:

Contrary to how [Enbridge's] PR [public relations] specialists frame it, the Replacement Segment Project is a huge undertaking that involves replacing four miles of two 20" pipelines with one 30" pipeline and encasing it within a newly constructed tunnel under the Straits of Mackinac. This scope of work was not included in their original 1953 pipeline approval, which specifically allowed for a 10-mile-long, 20-inch-diameter twin pipe across the bottom of the Straits.

Senator Irwin's initial comments, p. 1. Senator Irwin also asserts that the route of the Line 5 Project is significantly different than the route approved in 1953 and, therefore, the relocation of the pipeline should be thoroughly examined by the Commission. Moreover, Senator Irwin argues that, because of the magnitude of the Line 5 Project and the new construction involved, Enbridge is required to file an Act 16 application and obtain Commission approval of the Line 5 Project pursuant to Rule 447.

Senator Irwin claims that Enbridge is "trying to evade the approval process by separating their plans to build a tunnel" from the Line 5 Project. *Id.*, p. 2. He asserts that, during the planning process, Enbridge indicated that it was pursuing a tunnel option to protect the pipeline and it was clear to all involved that governmental approval and permits were required. Senator Irwin states, "[i]n fact, the report clearly states that the Commission would serve as a regulator for the tunnel they intended to build. Now, Enbridge is contradicting themselves by claiming that 'the Project does not include the tunnel itself' despite the fact that they repeatedly discuss the tunnel." *Id.*, quoting Application, p. 2.

Additionally, Senator Irwin contends that, pursuant to MEPA, the Commission is required to evaluate the environmental impact of the Line 5 Project. He asserts that:

This project proposes numerous threats to our Great Lakes. First, it threatens the drinking supply for five million Michigan residents. It is also dangerous to many of our aquatic ecosystems. The pipeline passes through one of the most productive fisheries in the Great Lakes. If damage to the pipeline occurred [sic], it would impact tribal treaty rights, commercial fishing, habitat, and recreational fishing, boating, and swimming. It also could negatively affect several endangered plant species such as Houghton's Goldenrod and the Dwarf Lake Iris.

*Id.* Furthermore, Senator Irwin alleges that the Line 5 Project promotes climate change, threatens energy security, and is in direct conflict with many municipalities working with EGLE's 2030 program to reduce greenhouse gas emissions to zero by 2030. In his opinion, the Commission should be working to ensure future energy security with renewable resources.

Thus, Senator Irwin requests that the Commission deny Enbridge's request for declaratory relief and conduct a contested case to protect the rights of interested parties, to investigate the risks of the Line 5 Project, and to make the appropriate determinations.

On May 13, 2020, the Straits of Mackinac Alliance (SMA) filed comments in response to Enbridge's request for declaratory relief. SMA opposes the Line 5 Project and disputes Enbridge's claim that the Commission's findings in the 1953 order apply to the Line 5 Project. SMA asserts that "Line 5 is different now. Its daily volume is far higher. It is currently pumping 23 million gallons per day (547,000 barrels) of mostly Canadian crude oil, or NGLs, daily through the Straits twin pipeline segment. In 1953, Line 5 was designed to handle 300,000 barrels or 12.6 million gallons a day." SMA's initial comments, p. 2 (footnote omitted). SMA notes that Enbridge has nearly doubled the capacity of Line 5 since 1953.

In addition, SMA contends that the design of the Line 5 Project is significantly different than the design approved in the 1953 order. SMA states that, unlike the Dual Pipelines, the Line 5 Project is a four-mile, 30-inch-diameter, single pipeline that, presumably, will be seam-welded rather than butt-welded like the Dual Pipelines. Furthermore, SMA asserts that, compared to the Dual Pipelines, the Line 5 Project "will be inside a tunnel, fastened to the tunnel itself, with a fixed thermal expansion joint at the center of the segment (Application, par. 21)." *Id.*, p. 3. Thus, SMA asserts that the Line 5 Project is a completely new and different pipeline that requires new Commission approval.

SMA also disagrees with Enbridge that the Line 5 Project is simple maintenance and repair of the existing pipeline. SMA states that “[t]he ordinary meaning of maintenance is to preserve the status quo. The technical meaning of maintenance involves functional checks, repairing or replacing of necessary devices, equipment, and machinery.” *Id.* SMA contends that the Line 5 Project is a \$4-billion-dollar major infrastructure project that requires two million man-hours of construction for at least three years. Accordingly, SMA asserts that the Line 5 Project is new construction and not maintenance of the existing Dual Pipelines.

In addition, SMA disputes Enbridge’s reliance on *Dehn* to support its claim that the Line 5 Project is in the public interest. SMA states that, while the Michigan Supreme Court in *Dehn* “approved the MPSC finding of a public purpose [for Line 5], it also relied upon a number of factors which are no longer applicable today.” *Id.*, p. 4. SMA notes that, according to the Court, the Commission relied upon the contention that Line 5 would supply several unidentified Michigan refineries. However, SMA asserts that, currently, the Detroit Marathon refinery is the only Michigan refinery that is being supplied—but only partially—by Line 5. Moreover, SMA states that, although the Court found that intrastate transport of oil production would serve a public purpose, in fact, “rather limited Michigan Kalkaska oil quantities are added to Line 5 at the Lewiston, Michigan pumping station. Clearly these 67-year-old MPSC and Supreme Court decisions relied on proposed benefits that did not occur.” *Id.* Therefore, SMA asserts that the Commission’s findings in the 1953 order are not applicable 67 years later and that Enbridge’s request for declaratory relief should be denied.

On May 13, 2020, the Bay Mills Indian Community (Bay Mills) timely filed comments opposing Enbridge’s request for declaratory relief. As an initial matter, Bay Mills notes that it agrees with the joint comments submitted by the Environmental and Tribal Groups.

Bay Mills explains that it is one of the signatories of the 1836 Treaty of Washington (1836 Treaty), which ceded territory to the United States for the creation of the State of Michigan. Bay Mills states that, pursuant to the 1836 Treaty, it reserved the right to hunt and fish throughout the ceded territory, which includes the Great Lakes and the Straits. Bay Mills also notes that:

the State of Michigan and the signatory tribes to the 1836 Treaty entered into a consent judgment in 1985 regarding management of the Great Lakes fishery. That agreement affirmed that the State and the Tribal Nations must work together to protect the Tribal Nations' treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. The Tribal Nations and the State have worked together to protect the Great Lakes ever since.

Bay Mills' initial comments, p. 3. In addition, Bay Mills avers that the Great Lakes and the Straits are of substantial cultural significance to the tribe. For these reasons, Bay Mills contends that it has significant concerns regarding Enbridge's proposal to construct a tunnel under the lakebed of the Straits for transporting liquid petroleum.

In Bay Mills' opinion, the Commission should deny Enbridge's request for declaratory relief for several reasons. First, Bay Mills asserts that Enbridge misrepresents the scale and scope of the Line 5 Project.

In an effort to piggyback on an approval process that occurred 67 years ago, Enbridge characterizes the current Proposal as a "modest" relocation and a "maintenance-based" replacement that will be located "very close" to the dual pipelines that currently run through the Straits of Mackinac. (Enbridge's Application, p. 16-17.) By minimizing what is involved and what is at stake, Enbridge argues that the work involved in the Line 5 project is consistent with what was initially approved in 1953.

Bay Mills' initial comments, p. 5. Contrary to Enbridge's claim that the Line 5 Project is a minor and simple replacement of portions of the existing pipeline, Bay Mills argues that the Line 5 Project is sizeable and extensive and involves replacing the Dual Pipelines with a 30-inch-diameter pipeline and relocation of the pipeline in a tunnel deep beneath the lakebed.

Second, according to Bay Mills, Enbridge is claiming that, because it is not proposing to relocate the beginning or end of the pipeline, it does not need new approval from the Commission to replace the pipeline segment. Bay Mills objects, asserting that Enbridge's position is inconsistent with the broad regulatory authority granted to the Commission in Act 16 to "control, investigate and regulate' the business of transporting crude oil and petroleum products." *Id.*, pp. 6-7. In addition, Bay Mills notes that Rule 447 states that a corporation must file an application and obtain Commission approval if it "wants to construct facilities to transport crude oil or petroleum' products." *Id.*, p. 7, quoting Rule 447(1)(c). Bay Mills argues that Rule 447 does not provide a distinction between a new pipeline facility and a modification to an existing facility; rather, it requires that a corporation file an application for all pipeline facilities.

Third, Bay Mills states that, when reviewing an Act 16 application, the Commission considers whether the applicant has demonstrated a public need for the proposed pipeline, whether the proposed pipeline is designed and routed in a reasonable manner, and whether the construction of the pipeline will meet or exceed safety and engineering standards. Bay Mills asserts that, if Enbridge is permitted to rely on the 1953 order as approval for the Line 5 Project, Enbridge will inappropriately circumvent the Commission's established Act 16 review process.

Fourth, Bay Mills states that when the 1953 easement and its amendment were executed, "the construction of a tunnel to house a new pipeline in a new location was [not] contemplated . . . . Indeed, the 1953 easement specifically requires the Commission's renewed approval for any relocation or replacement of the pipeline." *Id.*, p. 8 (footnote omitted). As a result, Bay Mills argues that Enbridge does not have authority to construct the Line 5 Project based on the 1953 order, the 1953 easement, or its amendment.



Fifth, Bay Mills contends that a contested case is necessary because the Commission must determine whether the Line 5 Project complies with MEPA. Bay Mills states that “[t]he Commission’s decision in 1953 long predates the enactment of MEPA in 1970. The type of environmental impact analysis that is required today was not required then. Michigan law now requires that the Line 5 Project undergo environmental scrutiny and Enbridge’s request [for declaratory relief] must, therefore, be denied.” *Id.*, p. 11. Bay Mills also argues that, because Enbridge claims that the Line 5 Project will eliminate the possibility of a catastrophic oil spill and promote environmental protection of the Great Lakes, inland waterways, aquatic ecosystems, and endangered species, an environmental analysis pursuant to MEPA is particularly important in this case.

In conclusion, Bay Mills asserts that, pursuant to the 1836 Treaty, it has a protected legal interest in the Great Lakes, including the Straits. Bay Mills states that, if the Commission grants Enbridge’s request for declaratory relief, it will deny Bay Mills and other tribes “the opportunity for meaningful consultation and to present concerns to the Commission in a contested case hearing.” *Id.*, p. 13. For this reason and those stated above, Bay Mills requests that the Commission deny Enbridge’s request for declaratory relief and, instead, conduct a full contested case to protect the rights of interested parties and to effectuate appropriate and lawful long-term decisions that arise from Enbridge’s application.

Several tribes filed comments in support of, or substantially similar to, those submitted by Bay Mills: Bad River Band of Lake Superior Tribe of Chippewa Indians (Bad River Band), Great Lakes Indian Fish and Wildlife Commission (GLIFWC), the Keweenaw Bay Indian Community, Lac du Flambeau Band of Lake Superior Chippewa Indians (Lac du Flambeau Band), Lac Vieux Desert Band of Lake Superior Chippewa Indians (Lac Vieux Desert Band), Little Traverse Bay

Bands of Odawa (Little Traverse Bay Bands), Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, Nottawaseppi Huron Band of the Potawatomi, Sault Ste. Marie Tribe of Chippewa Indians, Sokaogon Chippewa Community, and the Red Cliff Band of Lake Superior Chippewa, who also allege that Enbridge has been operating Line 5 in several areas under expired permits.

On May 13, 2020, the Pokagon Band of Potawatomi Indians (Pokagon Band) timely filed comments asserting that the Line 5 Project exceeds the scope and intent of the 1953 orders. The Pokagon Band states that “the 1953 Order authorizes Enbridge to ‘construct, operate and maintain’ the 30" oil pipeline, with the Dual Pipeline ‘to be used for crossing the Straits’. The 1953 Order does not authorize Enbridge to ‘relocate’ the Dual Pipeline as proposed through the Application because ‘construct’, ‘operate’ and ‘maintain’ do not encompass ‘relocate’ . . . .” Pokagon Band’s initial comments, p. 2. Moreover, the Pokagon Band argues that the 1953 order does not authorize Enbridge to replace the 20-inch-diameter Dual Pipelines with a 30-inch-diameter pipeline.

The Pokagon Band also notes that, in the 1953 supplemental order, the Commission approved Lakehead’s requested engineering design change to accommodate higher operating pressure without the need for submitting a new application because Lakehead was not requesting a change in route for the Dual Pipelines. However, the Pokagon Band asserts that, in this case, Enbridge is proposing to replace the Dual Pipelines with 30-inch-diameter pipe and to relocate the pipeline in a tunnel deep beneath the lakebed. The Pokagon Band contends that these substantial changes were not contemplated in 1953 and, thus, are not authorized by the 1953 orders. In conclusion, the Pokagon Band requests that the Commission deny Enbridge’s request for declaratory relief and conduct a full contested case.

On May 13, 2020, the Sierra Club timely filed comments agreeing with and adopting by reference the comments filed by the Environmental and Tribal Groups, Bay Mills, the Environmental Coalition, and FLOW.

### Reply Comments

On May 27, 2020, Enbridge timely filed reply comments responding to the claims made by commenters but also reiterating that it has the requisite authority, pursuant to the 1953 order, Act 359, the Tunnel Agreement, and the 2018 tunnel easement, to construct the Line 5 Project within a tunnel beneath the Straits.

In its reply comments, Enbridge disputes the Attorney General's and FLOW's claims that: (1) Enbridge is not the legal successor-in-interest to Lakehead; (2) it is not the legal owner of Line 5; and (3) it does not have the authority to construct the Line 5 Project pursuant to the 1953 order. In response to the claim that it is not the legal successor-in-interest, Enbridge asserts that "[t]his argument is without merit because in 1991 this Commission approved the transfer of Line 5 from Lakehead Pipe Line Company, Inc. (the applicant the 1953 Order) to Lakehead Pipe Line Company, Limited Partnership, which in 2002 changed its name to Enbridge Energy, Limited Partnership (the Applicant in this case)." Enbridge's reply comments, p. 4, citing the November 8, 1991 order in Case No. U-9980 (November 8 order) (emphasis in original). Thus, Enbridge states that there is no dispute that it is the successor-in-interest to Lakehead.

Responding to comments claiming that the Line 5 Project exceeds the scope of the approval set forth in the 1953 order, Enbridge argues that the 1953 order grants broad authority to construct, operate, and maintain Line 5 and it does not require Enbridge to seek additional Commission approval if it is determined that continued operation of Line 5 requires replacement or relocation of a portion of the pipe along the approved route.

In addition, Enbridge asserts that, “[d]espite the arguments to the contrary, the 1953 Order approving a route for Line 5 did not narrowly fix an exact location for Line 5 which could not be deviated from absent further approval from the Commission. The actual route approved in the 1953 Order is described in the most general terms.” *Id.*, p. 5. Moreover, Enbridge states that the 1953 order does not require that Line 5 be located within the 1953 easement. Enbridge notes that the 1953 order was issued before the 1953 easement and the “1953 Order only generally mentions that Line 5’s route will cross ‘under said Straits’ with no specific mention of the yet to be executed 1953 Easement or requirement that the crossing only be placed within the 1953 Easement.” *Id.*, p. 6. Therefore, Enbridge asserts that it is unquestionable that the relocation of the Line 5 Project within the tunnel does not contradict the terms set forth in the 1953 order.

Enbridge also argues that the 30-inch-diameter pipe proposed by the Line 5 Project is within the scope of the approval set forth in the 1953 order. Enbridge asserts that the 1953 order approves a 30-inch-diameter pipe for Line 5 but, for technical reasons, acknowledged that the portion of Line 5 that crosses the Straits would be constructed of two 20-inch-diameter pipes. Enbridge contends that “no fair reading of the 1953 Order prevents the Line 5’s Straits crossing from being relocated within a tunnel or the two 20-inch pipelines from being replaced by a single 30-inch pipeline.” *Id.*

Enbridge notes that several federally recognized Indian Tribes claim that, if the Commission grants Enbridge’s request for declaratory relief, it will deprive the Tribes of their right to consultation. Enbridge disagrees, asserting that the Commission is complying with this requirement and that the State of Michigan, through the enactment of Act 359, has made the public policy determination that relocating Line 5 within the tunnel is in the best interest of the state. Enbridge contends that “the tribes will continue to have an opportunity to consult with the state

and the federal government and shape the outcome regarding the tunnel through the numerous permitting activities that remain.” *Id.*, p. 24.

Enbridge also disputes the commenters’ allegation that its request for declaratory relief should be denied because it involves complicated issues that cannot be easily resolved in a declaratory ruling. Enbridge asserts that its “request for declaratory relief presents a straightforward legal question with no need for any complex factual determinations.” *Id.* According to Enbridge, the Commission does not need to decide whether the tunnel is in the public interest, because the State of Michigan has already made this determination pursuant to the enactment of Act 359. In addition, Enbridge contends that “Line 5’s overall impact on climate change” and the role of Line 5, “given the changing nature of petroleum in the economy[,] are not germane to Enbridge’s Application.” *Id.*, p. 25. Therefore, according to Enbridge, its request for declaratory relief presents a single legal question that can easily be decided by the Commission.

Next, Enbridge disputes claims that the tunnel should be included as part of the Line 5 Project. Enbridge argues that construction and management of the tunnel is governed by Act 359 and the MSCA, not Act 16, and therefore construction of the tunnel does not require Commission approval.

According to Enbridge, because the Commission has no common law powers, it would need statutory authority to approve construction of the tunnel. Enbridge explains that under Act 16, “the commission is **granted the power to control, investigate, and regulate** a person . . . [e]xercising or claiming the right to carry or transport crude oil or petroleum, or . . . [e]xercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or . . . [e]ngaging in the business of buying, selling, or dealing in crude oil or petroleum.’ MCL 483.3(1).” *Id.*, p. 8, quoting MCL 483.3(1) (emphasis in original). In

Enbridge's opinion, pursuant to *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 151; 428 NW2d 322 (1988), the Commission must have clear and unmistakable statutory authority to regulate the construction of the tunnel and Act 16 does not provide this authority. Furthermore, Enbridge asserts that the Michigan Supreme Court has held that the language in Act 16 simply defines the Commission's jurisdiction and it does not grant the Commission specific powers, such as the authority to approve construction of a tunnel.

Enbridge also states that the tunnel is not a "fixture" or "equipment appurtenant" to the Line 5 Project and, thus, is not subject to the Commission's authority under Act 16. MCL 483.6. Enbridge asserts that the tunnel is being constructed pursuant to Act 359 and, "[f]ar from being a fixture or equipment appurtenant to Line 5, the tunnel is a structure, distinct from the pipelines and other utility lines that may be placed within it, to be used to house a variety of utility infrastructure." *Id.*, p. 10. Enbridge explains that the plain meaning of the term "fixture" is "a thing that, though originally a movable good, is, by reason of its annexation to land, regarded as a part of the land." *Id.* Enbridge argues that the tunnel is not a moveable good, and instead is an underground structure, and therefore does not fit the definition of "fixture." Regarding the term "equipment appurtenant," Enbridge states that "[t]he term 'equipment' means 'goods other than inventory, farm products, or consumer goods.' MCL 440.9102(gg). The term 'goods means all things that are movable.' MCL 440.9102(qq). Equipment appurtenant to a pipeline refers to equipment attached to a pipeline, such as valves. *See*, R 460.14013." *Id.*, p. 11. Enbridge avers that the tunnel does not meet the definitions of "equipment" or "goods" and, therefore, is not subject to the Commission's Act 16 jurisdiction.

Moreover, Enbridge contends that the MSCA, not the Commission, has statutory "authority to 'acquire' and 'operate' the tunnel, to charge utilities fees for the tunnel's use, and to also lease the

tunnel to utilities. MCL 254.324a; MCL 254.324d(1).” *Id.* Enbridge argues that Act 359 gives the MSCA a specific statutory grant of authority over the tunnel, which cannot be not superseded by a general reference to the Commission’s authority in Act 16. And, although some commenters assert that Commission approval of the tunnel is required pursuant to Section 14d(4)(g) of Act 359, Enbridge states that “[a]t most, this provision of Act 359 would require Enbridge to obtain approval to relocate the replacement pipe segment into the tunnel if that authority had not already been granted by the 1953 Order.” *Id.*, p. 12. In any event, Enbridge contends that it has applied to EGLE and USACE for the required permits to construct the tunnel.

In addition, Enbridge disputes the claim that construction of the tunnel is subject to Rule 447(1)(c). Enbridge asserts that the tunnel is not a facility that transports crude oil or petroleum, “but rather a structure to house transportation facilities,” and therefore is not subject to Rule 447(1)(c). *Id.*, p. 17. Enbridge argues that because Act 359 provides the MSCA with authority to “acquire, construct, operate, maintain, improve, repair, and manage” the tunnel, Rule 447 cannot supersede the statute and “extend the Commission’s regulatory authority over the tunnel . . . .” *Id.*, p. 18, quoting MCL 254.324a(1) and MCL 254.324d(1). Again, Enbridge avers that, pursuant to *Union Carbide*, the Commission’s grant of authority must be conveyed by clear and unmistakable language and Rule 447 does not provide this authority.

Enbridge then reiterates the arguments set forth in its initial comments that, pursuant to Rule 447, it is not required to seek new Act 16 authority from the Commission to construct the Line 5 Project. Enbridge restates that the 1953 order provides the requisite authority to construct, operate, and maintain the Line 5 Project and that Rule 447 only applies to the construction of new pipelines or the extension of existing pipelines that will provide service in a new area. Enbridge argues that:

To adopt the commenters' argument would mean that any and all future construction activity - - no matter how appropriate for the continued operation, maintenance, or repair of a pipeline - - requires additional approval from the Commission and perhaps even a full contested case proceeding. This narrow interpretation of the Commission's past grant of authority is untenable. This would mean that every time an operator sought to engage in construction to maintain, repair or replace an existing valve or portion of its existing pipe, the construction activity would need to wait until an application pursuant to Rule 447 is filed and approved. Nothing in Act 16 or the 1953 Order supports such a narrow and untenable interpretation, and the Commission should not now impose such an impractical and unsustainable standard.

*Id.*, p. 15. Enbridge argues that, just because the Commission has, in the past, required a new Act 16 application approval for modifications to pipelines, the Commission is not required to do so in this case.

Moreover, Enbridge asserts that neither Act 16 nor Rule 447 require a contested case hearing. In fact, Enbridge states that "the Commission has routinely held that applications filed pursuant to Rule 447 do not require a contested case hearing." *Id.*, p. 18, citing the February 12, 2004 order in Case No. U-13874 and the September 24, 2013 order in Case No. U-17478.

Enbridge also disputes commenters' claims that a contested case is required by Section 1(2) and Section 6 of Act 16. According to Enbridge, "[o]n its face, Section 1(2) only requires compliance with Act 16 in order to locate pipelines within the state. MCL 438.1(2). Nothing in this section specifies any particular standard that needs to be met for compliance, but it simply requires compliance with the other provisions of Act 16." *Id.*, pp. 12-13. Regarding Section 6 of Act 16, Enbridge asserts that the required explicit acceptance of Act 16 was filed with the 1953 application and it was renewed by Enbridge in its current application. Further, Enbridge contends that, with its current application, it filed a plat showing the route along which the proposed Line 5 Project will be constructed, which complies with the requirements of Section 6 of Act 16. Enbridge argues that Act 16 does not require Commission pre-approval of the plat.



And, contrary to claims by commenters, Enbridge contends that nothing in MEPA or *Buggs v Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket Nos. 315058 and 315064) requires the Commission to conduct a contested case. Rather, Enbridge asserts that MEPA only requires the Commission to consider the environmental impact of the requested regulatory relief compared to the environmental impact of the alternative. Enbridge states that, in this case, its “Environmental Impact Report (Exhibit A-12) demonstrates that the construction of the Project will have, at most, a temporary and negligible impact on the environment. Yet, the granting of the relief will fulfill an important environmental objective of the State of Michigan, which is to alleviate a perceived environmental risk to the Great Lakes.” *Id.*, p. 21. Enbridge argues that, if its request for declaratory relief is granted, it will further the goals of MEPA because the alternative is to continue operation of the Dual Pipelines. In addition, Enbridge notes that the permitting for, and the environmental impact of, the tunnel will be reviewed by EGLE and USACE. Therefore, Enbridge avers that a contested case is unnecessary for the Commission to review the environmental impact of the Line 5 Project.

In response to the commenters’ claims that the 1953 easement and the 2018 tunnel easement do not comply with the public trust doctrine, Enbridge asserts that those claims are not properly before the Commission. Enbridge states that the Commission does not have the jurisdiction to resolve these disputes and that they will be addressed in other forums. As a result, Enbridge contends that these issues should not affect the Commission’s resolution of Enbridge’s application.

Finally, Enbridge reiterates that, through the First, Second, and Third Agreements and the enactment of Act 359, the State of Michigan has established a public policy and determination that the Line 5 Project and the tunnel are in the public interest and alleviate a perceived environmental threat to the Great Lakes. Enbridge asserts that, compared to the overall population of Michigan,

the percentage of public opposition to the Line 5 Project is minimal and that many Michigan counties, municipalities, and citizens support the project.

On May 27, 2020, Bay Mills timely filed reply comments. Bay Mills asserts that Enbridge's request for a declaratory ruling should be denied because it fails to comply with the requirements of Rule 448: "Enbridge's request is based on an incomplete description of the Line 5 Tunnel Project and a flawed legal analysis that do not support the conclusion that Enbridge can bypass the Commission's application process and rely, instead, on the 1953 approval of Line 5 to relocate a portion of the pipeline in a massive concrete tunnel." Bay Mill's reply comments, p. 3. Bay Mills contends that the relevant facts are evolving and in dispute and, therefore, a Rule 448 declaratory ruling would be inappropriate.

Bay Mills notes that, according to Enbridge, if Rule 447 is read as a whole, it is not required to seek new Act 16 approval because the Line 5 Project is a replacement of pipeline and "Rule 447's application requirements only apply to the construction of facilities to transport crude oil or petroleum products if those facilities are for 'future services and not for services already provided.'" *Id.*, p. 7, quoting Enbridge's initial comments, p. 15 (footnote omitted). Bay Mills disagrees, asserting that Rule 447 does not contain the term "future services" and that Enbridge is attempting to twist the intent of Rule 447. Bay Mills explains that Enbridge creates:

a "future services" limitation by pointing to [Rule] 447(2)(c)'s requirement that an applicant proposing construction identify the "nature of the utility service to be furnished." From the phrase "to be furnished," Enbridge infers that the entire Rule 447 application requirement only applies if "future services" (i.e., services that are not currently being provided) are being contemplated. Yet, Enbridge's entire argument relies on a provision governing utilities. Enbridge is not proceeding as a utility—it has filed its application under subsection (c) of Rule 447(1), not under subsections (a) or (b), the subsections requiring applications by utilities who seek approval to construct facilities for furnishing public utility service. Thus, Rule 447 (2)(c)'s requirement for applications submitted by utilities is inapplicable.

*Id.*, p. 9 (footnote omitted). In any event, Bay Mills alleges that even if Rule 447 is interpreted to require applicants to identify the nature of the utility service to be provided, the rule simply recognizes that a facility, yet to be constructed, will provide a service in the future. Bay Mills explains that, “[i]n other words, the verb ‘to be’ refers to the services that will be provided by the proposed facility—even if that service is already being provided by a facility or pipeline that already exists.” *Id.*, pp. 9-10.

Next, Bay Mills contends that, in the past, the Commission has required Enbridge to file Act 16 applications for the replacement of existing pipeline. Bay Mills asserts that, “in the aftermath of the disastrous rupture of Enbridge’s 2010 Line 6B oil spill—one of the largest inland oil spills in U.S. history—Enbridge filed an application seeking authorization to replace certain segments of Line 6B. In its order approving the settlement in that matter, the Commission states that ‘the parties agreed that the pipeline is subject to the requirements of Act 16.’” *Id.*, p. 8 (footnotes omitted). Therefore, Bay Mills disagrees with Enbridge’s claim that the Commission has not previously required an Act 16 application for the replacement of an existing pipeline.

Bay Mills also objects to Enbridge’s claim that the Line 5 Project is consistent with the State of Michigan’s established public policy goal to construct the Line 5 Project and locate it within a tunnel and, therefore, Commission approval of the project is unnecessary. Bay Mills asserts that “the tunnel agreements explicitly acknowledge that Enbridge must seek all required governmental approvals and permits for the tunnel,” which includes Commission approval of the Line 5 Project. *Id.*, p. 11. In addition, Bay Mills disputes Enbridge’s allegation that Act 359 is the State of Michigan’s only public policy relating to Line 5; Bay Mills states that the State of Michigan may have other public policy considerations that would affect the Line 5 Project.

Bay Mills claims that Enbridge's request for declaratory relief contravenes the Commission's obligation "to vigorously examine, vet and regulate proposals like Enbridge's Line 5 Tunnel project. That policy is reflected in Act 16's broad grant of authority to the Commission to control and regulate and to promulgate rules and regulations to exercise that regulatory control." *Id.*, p. 16. Accordingly, Bay Mills asserts that the Line 5 Project warrants a contested case so that the Commission may examine the many factual issues and legal questions. Bay Mills also reiterates that it has filed a petition to intervene in these proceedings and that the Commission should conduct a contested case to protect the legal rights of interested parties, such as the Tribal Nations, and provide them with a meaningful opportunity to participate.

Finally, Bay Mills states that Enbridge's request for *ex parte* approval should be denied because the Commission is required to thoroughly review and evaluate Act 16 applications. Bay Mills explains that, because the Line 5 Project is complex and there is "significant interest and controversy surrounding it," it should proceed as a contested case. *Id.*, p. 17. In addition, Bay Mills argues that, for the Commission to make an informed decision regarding Enbridge's Act 16 application, it is necessary to further develop the record, provide an opportunity for discovery, and conduct an evidentiary proceeding.

Several tribes filed reply comments that support and fully adopt by reference Bay Mills' reply comments: Bad River Band, GLIFWC, Keweenaw Bay Indian Community, Lac du Flambeau Band, Lac Vieux Desert Band, Little Traverse Bay Bands, and the Sokaogon Chippewa Community.

On May 27, 2020, the Environmental and Tribal Groups timely filed reply comments. They reiterate that the 1953 orders do not provide Enbridge the requisite authority to construct the Line 5 Project. The Environmental and Tribal Groups state that "those orders did not approve the

construction of a tunnel and did not approve the proposed configuration of the new pipeline segment. And even if the new project was within the scope of the 1953 Orders, the Commission reserved jurisdiction and authority over Line 5, and the right to issue subsequent orders as the Commission deemed necessary.” Environmental and Tribal Groups’ reply comments, p. 3. Thus, the Environmental and Tribal Groups contend that, because the Line 5 Project involves the construction of a new pipe segment, on a new easement, within a newly constructed tunnel, the 1953 orders do not provide Enbridge the authority to construct the project.

In response to Enbridge’s claim that, pursuant to Act 16, it is only required to file a plat location of the pipeline and is not required to obtain pre-approval of the plat by the Commission, the Environmental and Tribal Groups assert that, if the Commission accepts Enbridge’s argument, then any pipeline or facility that transports petroleum or crude oil would only be required to file a plat, could avoid the application process, and would evade Commission review and approval. Rather, they assert that Act 16 provides the Commission broad authority “to regulate any entity that carries or transports crude oil or petroleum” and, under the Commission’s longstanding practice and policy, Enbridge is required to file an application pursuant to both Act 16 and Rule 447. *Id.*, p. 7 (footnote omitted).

The Environmental and Tribal Groups disagree with Enbridge’s allegation that the phrase “service to be furnished” in subsection (2)(c) of Rule 447 implies that subsection (1)(c) only requires an application for the construction of oil transport projects that will be providing service in a new area. They assert that Enbridge contorts the meaning of Rule 447: “What Enbridge means is that the Commission should not apply the text as written, and instead should impute a different meaning to Rule 447(1)(c) using words or phrases from other sections as evidence of intent.” *Id.*, p. 8. The Environmental and Tribal Groups argue that the language of Rule 447(1)(c)

is clear and unambiguous and states that “an entity ‘that wants to construct facilities to transport crude oil or petroleum’ must file an application with the Commission. None of the terms in that provision are ambiguous, so it would be improper to resort to other sections to interpret section 1(c), as Enbridge urges.” *Id.*, pp. 10-11, quoting Rule 447(1)(c).

In addition, the Environmental and Tribal Groups assert that subsections (2) and (3) of Rule 447 do not support Enbridge’s claim that, because Line 5 is already in service, a new application is unnecessary. They state that:

Enbridge’s argument is not only convoluted; it is based on the omission of a keyword from the phrase Enbridge relies on. As noted earlier, section 2(c) of Rule 447 refers to “the nature of the utility service to be furnished.” Enbridge omits the word “utility” from all of its discussion of section 2(c). The reason for the omission is that Enbridge is not a utility, and Line 5 does not furnish utility service.

*Id.*, p. 11, quoting Rule 447(2)(c) (emphasis in original) (footnote omitted). They explain that, pursuant to 1929 PA 69, MCL 460.501 (Act 69), a “public utility” is a person or corporation that owns or operates “equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.” In addition, the Environmental and Tribal Groups note that, pursuant to the Commission’s Consumer Standards and Billing Practices for Electric and Natural Gas Service, Mich Admin Code, R 460.102b(m) (Rule 2b(m)), “utility” is defined as “a firm, corporation, cooperative, association, or other legal entity that is subject to the jurisdiction of the commission and that provides electric or gas service.” They assert that Enbridge is not a utility pursuant to Act 69 or Rule 2b(m), and that an Act 16 pipeline, such as Line 5, does not provide utility service pursuant to Act 69 or 1929 PA 9, MCL 483.101 *et seq.* (Act 9). The Environmental and Tribal Groups note that Enbridge makes a similar argument about Rule 447(3) but they assert that the argument fails for the same reasons.

Next, the Environmental and Tribal Groups disagree with Enbridge that there will be adverse policy consequences if the Commission determines that the Line 5 Project and tunnel require Commission approval. According to the Environmental and Tribal Groups, Enbridge states that, “requiring an application for the Line 5 replacement pipe and tunnel will set a precedent requiring Commission approval of any minor electric and gas utility replacement or relocation; and that this state of affairs will ‘create unintended consequences and undue delays to necessary future projects.’” *Id.*, p. 13, quoting Enbridge’s initial comments, p. 18. The Environmental and Tribal Groups argue that the application requirement in Rule 447 will not apply equally to electric and gas utilities, because the triggering language for an application under subsection (1)(c) is different than subsections (1)(a) or (b): “Both sections 1(a) and (b) require an application only for projects ‘for which a certificate of public convenience and necessity is required by statute.’ By contrast, section 1(c) includes no reference to a certificate of public convenience and necessity.” *Id.*, p. 14, quoting Rule 447(1)(a) and (b) (footnote omitted). The Environmental and Tribal Groups assert that, if the Commission determines that an application is required in this case pursuant to Rule 447(1)(c), it will not have the consequence of also requiring applications for projects that require a certificate of public convenience and necessity (CPCN).

The Environmental and Tribal Groups also contend that Enbridge’s request for *ex parte* approval of its application should be denied because Enbridge failed to provide legal authority for the request or an applicable Commission rule. They assert that, pursuant to the Commission’s Rules of Practice and Procedure, Mich Admin Code, R 792.10415(1) (Rule 415), “the Commission has broad discretion to set any matter for contested case where not prohibited by law. The Commission has historically used this discretion to open a contested case – even where not required – when a proceeding is the subject of substantial intervenor interest.” Environmental and

Tribal Groups’ reply comments, p. 14. According to the Environmental and Tribal Groups, several parties have filed petitions to intervene—or stated an intent to do so—and because there is substantial public interest in this case, and significant factual and policy questions to be decided, they request that the Commission deny Enbridge’s request for *ex parte* approval of its application.

Finally, the Environmental and Tribal Groups aver that Enbridge has failed to provide legal authority supporting its claim that the tunnel should not be considered part of the Line 5 Project. The Environmental and Tribal Groups reiterate the arguments set forth in their initial comments that: (1) pursuant to Act 16 and Rule 447, the Commission has jurisdiction and authority over the tunnel; (2) the tunnel is a facility used for the transport of crude oil and petroleum products; (3) the tunnel is a fixture used in connection with the transport of these substances; and (4) the tunnel is the secondary containment system for the pipeline. *Id.*, p. 16. They request that the Commission promptly clarify whether the tunnel is part of the Line 5 Project because it “will promote administrative efficiency and conserve resources by avoiding (or providing needed guidance for) discovery disputes, motions to strike, and evidentiary objections.” *Id.*

On May 27, 2020, the Environmental Coalition timely filed reply comments. The Environmental Coalition reiterates the arguments set forth in its initial comments that the Commission should deny Enbridge’s request for declaratory relief because the construction of a new tunnel and pipeline in the Straits does not fall within the scope of the 1953 order and requires a separate application.

In response to Enbridge’s claim that the Commission does not have jurisdiction over the construction of the tunnel because it is governed by Act 359 and the MSCA, the Environmental Coalition asserts that the enactment of Act 359 did not revoke the requirements set forth in Act 16:

Act 16 continues to require that to grant an application, the Commission must find that:



- (1) the applicant has demonstrated a public need for the proposed pipeline,
- (2) the proposed pipeline is designed and routed in a reasonable manner, and
- (3) the construction of the pipeline will meet or exceed current safety and engineering standards.

The Commission must also determine if there are environmental impacts from the proposed project and whether those can be appropriately mitigated. *State Hwy Comm v. Vanderkloot*, 329 Mich 159, 185-87; 220 NW2d 416, 428 (1974).

Environmental Coalition's reply comments, p. 2. The Environmental Coalition states that, because the tunnel and the Line 5 Project are a single construction project, the Commission has a statutory obligation to determine whether both the tunnel and the Line 5 Project are permissible under Act 16. The Environmental Coalition avers that the agreements made between Enbridge and the State of Michigan cannot negate the Commission's statutory obligations under Act 16.

The Environmental Coalition disagrees with Enbridge that the sole purpose of the tunnel is to mitigate Line 5's environmental risk to the Great Lakes. It states that "certainly the purpose of the tunnel is much broader, because the 'perceived environmental risk' could be not only mitigated, but entirely eliminated, by stopping operation of Line 5 entirely." *Id.*, p. 3, quoting Enbridge's initial comments, pp. 9-10. The Environmental Coalition asserts that the Commission is required to determine whether there is a public need for the tunnel and the Line 5 Project, and nothing in Act 359 prevents the Commission from doing so.

Next, the Environmental Coalition notes that Section 1 of Act 16 states that "a person exercising or 'claiming the right to carry or transport crude oil or petroleum, or any of the products thereof . . . does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to *locate, maintain, or operate* the necessary pipe lines, fixtures, and equipment . . . *except as authorized by and subject to* this act.' MCL 483.1

(emphasis added).” *Id.* (emphasis in original). They contend that, according to the language in Act 16, a person or an entity may not construct pipelines or relocate existing pipelines without Commission approval.

Furthermore, the Environmental Coalition asserts that Section 2a of Act 16 supports the conclusion that Commission approval is necessary when relocating, maintaining, or operating a pipeline. They explain that:

Section 2a contains detailed requirements with respect to the physical impact of the pipeline on any landowner’s property, including written assurance that topsoil will be replaced, an estimate of the value of lost crop production, and payment for any damages incurred after construction of the pipeline. MCL 483.2a. These requirements would have little purpose if the pipeline operator, after having their application approved, could simply reroute portions of the pipeline over other property without approval and for which they had not met the Section 2a requirements.

*Id.*, p. 4.

The Environmental Coalition disputes Enbridge’s claim that when Rule 447 is read as a whole, it only applies to construction of a pipeline or the extension of an existing pipeline in a new service area. They contend that, pursuant to Enbridge’s interpretation of Rule 447, any relocation of any portion of Line 5 would not require Commission approval: “The Company could move the pipeline 250 feet below ground, or place the pipeline 250 feet above the Straits on stilts. The Company could move segments of the pipeline to run over different properties along different routes, so long as the beginning point and the endpoint of the pipeline remain static. This interpretation is nonsensical and therefore should not be applied.” *Id.*, p. 5.

In response to Enbridge’s request for *ex parte* approval of its application, the Environmental Coalition argues that Enbridge’s request runs contrary to the Commission’s goal of transparency. They assert that, on page 1 of the December 20, 1983 order in Case No. U-7076, the Commission stated that “[t]he rule of due process of law’ requires a ‘full and fair administrative hearing’ which

provides ‘an opportunity to all parties to present evidence and argument’ and ‘a decision by the administrative body on the basis of the evidence.’” Environmental Coalition’s reply comments, p. 6. Additionally, the Environmental Coalition contends that the APA contains procedural safeguards “to ensure that agency determinations are made through a fair and open process. It would violate the letter and spirit of this law to allow Enbridge Limited Partnership to seek approval of the construction of a tunnel to relocate Line 5 based on the Company’s own unilateral characterization of the facts.” *Id.* Therefore, they request that the Commission deny Enbridge’s request for *ex parte* approval of the Line 5 Project and, instead, conduct a contested case that will include input from the public.

### Discussion

#### 1. Enbridge Energy, Limited Partnership’s Request for a Declaratory Ruling

Enbridge requests a declaratory ruling pursuant to Section 63 of the APA and Rule 448.

Section 63 of the APA states that:

On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or *order* of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

MCL 24.263 (emphasis added). Accordingly, Rule 448 was promulgated by the Commission, which prescribes the form for a request for a declaratory ruling and the procedure for its submission, consideration, and disposition:

(1) Any person may request a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the commission or of a rule or *order of the commission*, pursuant to sections 33 and 63 of the act, MCL 24.201,

MCL 24.328. A request for a declaratory ruling shall contain, or by attached exhibits show, all of the following:

- (a) A complete, accurate, and concise statement of the facts or situation upon which the request is based.
- (b) A concise statement of the issues presented.
- (c) Specific reference to all statutes, rules, and orders to which the request relates.
- (d) An analysis by the person's legal counsel of the issues presented and a proposed conclusion, or the person's analysis of the issues presented and a proposed conclusion.

(2) The commission may require that notice of the request for declaratory ruling be provided and may require a contested case proceeding instead of issuing a declaratory ruling.

(3) The decision to issue a declaratory ruling is within the discretion of the commission.

Rule 448 (emphasis added). Enbridge requests a declaratory ruling pursuant to Rule 448 that, because the Line 5 Project is routine maintenance and replacement of a small segment of Line 5 that crosses the Straits, it has the requisite authority to construct the Line 5 Project based on the Commission's grant of authority in the 1953 order.

As Rule 448(3) provides, whether to issue a declaratory ruling, to decline to issue such a ruling, or to order a contested case are decisions within the discretion of the Commission. *See*, August 8, 2019 order in Case No. U-20585, p. 4; September 26, 2006 order in Case No. U-14702, p. 12; October 11, 2001 order in Case No. U-12979, p. 1. Based on the discussion below, the Commission grants Enbridge's request for a declaratory ruling, but denies the requested relief.

As an initial matter, the Commission notes that several commenters claim there is substantial confusion as to whether Enbridge is the legal successor-in-interest to Lakehead. The commenters assert that the Commission may not grant the requested declaratory relief because Enbridge is not

the legal owner of Line 5 and, therefore, it does not have the requisite authority under the 1953 easement and the 1953 orders to construct the Line 5 Project. Enbridge responds that the November 8 order demonstrates that it is the successor-in-interest to Lakehead, who was granted authority to construct, operate, and maintain Line 5 as set forth the 1953 order. Enbridge's reply comments, p. 4. The Commission finds that neither Enbridge nor the commenters provide a complete statement of facts, as required by Rule 448(1)(a); a specific reference to all applicable statutes, rules, orders, or caselaw, as required by Rule 448(1)(c); or a sufficient legal analysis, as required by Rule 448(1)(d), to assist the Commission in determining whether Enbridge is the legal successor-in-interest to Lakehead. Therefore, the Commission finds this issue does not meet the requirements of Rule 448 for consideration for a declaratory ruling. However, for purposes of issuing a prompt decision on Enbridge's request for declaratory relief or, in the alternative, *ex parte* approval of its Act 16 application, the Commission assumes, without making a factual finding, that Enbridge is the legal successor-in-interest to Lakehead.

Turning to Enbridge's request for declaratory relief, the Commission notes that the 1953 order provided a description of Line 5, which was to be constructed of a 30-inch-diameter single pipeline that was to traverse land and river crossings, and a separate description of the 20-inch-diameter Dual Pipelines that were specifically designed to cross the Straits. 1953 order, pp. 1-2. The 1953 order states that "[t]he Mackinac Straits crossing will consist of two parallel lines laid approximately 1,000 ft. [feet] apart and these lines will be 20" x .812" wall thickness. . . . The 20" schedule 60 (.812" wall) pipe is API [American Petroleum Institute] specifications 5L Grade A." *Id.*, pp. 4-5.

Regarding the location of the pipeline, the 1953 order states that it enters "the State of Michigan from the State of Wisconsin at a point near Ironwood, Michigan," proceeding in an

easterly direction through several counties in the Upper Peninsula of Michigan “to a point on the north boundary of the Straits of Mackinac, thence in a southerly direction under said Straits to a point on the south boundary thereof,” and then in a southerly direction through counties in the Lower Peninsula of Michigan. *Id.*, p. 2. In addition, the 1953 order notes that Lakehead “filed with its petition a map or plat of such proposed pipe line showing the approximate route to be traversed. Upon completion of the pipe line a more detailed map will be filed showing the exact location of the pipe line as laid.” *Id.*, p. 4.

Shortly after the 1953 order was approved, the Commission issued the 1953 supplemental order, which permitted Lakehead “to change the design engineering of its pipe line to permit higher operating pressure so that it would be able to transport a heavier grade of crude oil than was anticipated at the date of the [1953] order.” 1953 supplemental order, p. 1. The Commission approved Lakehead’s request after determining that:

1. The supplemental petition raises no new issue as to the status of the petitioner as a common carrier.
2. It does not request any change in the route of the pipe line.
3. The questions raised by the supplemental petition are entirely a matter of engineering design.
4. The public interest can be protected without the necessity of expending the time and money to hold a public hearing.
5. The increased thickness of the pipe line should be approved as proposed by the applicant.

*Id.*, p. 4. In the concluding paragraphs of the 1953 supplemental order, the Commission stated that, for all other purposes, the 1953 order remained in full force and effect. *Id.*, p. 5.

Subsequently, on April 23, 1953, the State of Michigan conveyed to Lakehead:

an easement to construct, lay, maintain, use and operate two (2) pipe lines, one to be located within each of the two parcels of bottom lands hereinafter described, and

each to consist of twenty inch (20") O D [outside diameter] pipe, together with anchors and other necessary appurtenances and fixtures, for the purpose of transporting any material or substance which can be conveyed through a pipe line, over, through, under and upon the portion of the bottom lands of the Straits of Mackinac in the State of Michigan . . . .

1953 easement, p. 2. According to the 1953 easement, the State of Michigan provided Lakehead the right to enter and construct Line 5 upon the bottom lands of the Straits that lie within 50 feet of each side of the "Easterly Center Line" and the "Westerly Center Line," which are specifically defined on pages 2 and 3 of the 1953 easement. In addition, the 1953 easement provided detailed descriptions of the various depths under the Straits that the pipeline must be laid and the depth for cover. *Id.*, p. 4. Finally, the 1953 easement states that, "in the event of any relocation, replacement, major repair, or abandonment of either of the pipe lines authorized by this easement, Grantee shall obtain Grantor's written approval of procedures, methods and materials to be followed or used prior to commencement thereof." *Id.*, p. 8.

On May 15, 1953, the State of Michigan approved an amendment to the 1953 easement (1953 easement amendment), stating that "because of the existence of permanent structures on the south shore of the Straits of Mackinac, it has been deemed necessary by Lakehead Pipe Line Company, Inc. to relocate the easterly of said two (2) 20" O D pipe lines by moving the southerly terminus of said pipe line approximately 100 feet to the west . . . ." 1953 easement amendment, p. 1.

Accordingly, the 1953 easement amendment provided a revised, detailed description of the Easterly Center Line to accommodate the change in location of one of the Dual Pipelines on the lakebed of the Straits. *Id.*, p. 2.

The Commission finds that the factors set forth on page 4 of the 1953 supplemental order provide the criteria for determining whether Enbridge has the requisite authority to construct the Line 5 Project pursuant to the authority granted in the 1953 order. In the 1953 supplemental order,

the Commission determined that Lakehead was not required to seek a new Commission order approving a modification to the construction of Line 5 because “[t]he questions raised by [Lakehead’s] supplemental petition are entirely a matter of engineering design.” 1953 supplemental order, p. 4. Lakehead’s proposed change in engineering design was to increase the thickness of the pipeline wall. In the immediate case, the Line 5 Project is not a simple modification to the engineering design of the existing Dual Pipelines. Rather, Enbridge is proposing a \$500 million construction project to replace the Dual Pipelines with a new, 30-inch-diameter, single pipeline and to decommission the Dual Pipelines.

In factor 2 of the 1953 supplemental order, the Commission found that Lakehead was not required to obtain additional approval for its proposed modification to Line 5 because Lakehead did “not request any change in the route of the pipe line.” *Id.* According to Enbridge, in the 1953 order, the routes for Line 5 and the Dual Pipelines were stated in very general terms. Enbridge argues that, because the 1953 order did not approve a specific location or route for the Dual Pipelines and because the Line 5 Project will be “located in an easement issued by the State of Michigan in very close geographic proximity to the existing location of the Dual Pipelines,” the Line 5 Project is not a request for a change in route. Application, p. 17. The Commission disagrees.

In order for Lakehead to have acquired the authority “to construct, lay and maintain” the Dual Pipelines, it was required to obtain an easement “over, through, under and upon certain lake bottom lands belonging to the State of Michigan.” 1953 easement, p. 1. In other words, without the 1953 easement and the 1953 easement amendment, Lakehead did not have the authority to construct the Dual Pipelines. As a result, the Commission finds that, although the 1953 order does not approve a specific location and route for the Dual Pipelines, Lakehead’s authority to construct,



maintain, and repair the Dual Pipelines was restricted by the requirements set forth in the 1953 easement and its amendment, which stated that the Dual Pipelines were to be constructed in a specific location and route in the Straits.

As noted above, Enbridge admits that the Line 5 Project “will not be placed within the precise easement that existed in 1953.” Application, p. 17. In addition, Enbridge proposes to relocate Line 5 to a concrete-lined tunnel 60 to 250 feet below the lakebed of the Straits. The Commission finds that the placement of Line 5 within a new easement and the relocation of Line 5 from atop the lakebed into a tunnel 60 to 250 feet below the lakebed is a significant change in location and vertical route from what was approved in the 1953 orders, the 1953 easement, and the 1953 easement amendment.

In factor 4 of the 1953 supplemental order, the Commission determined that Lakehead was not required to seek a new Commission order approving an increase in pipeline wall thickness because “[t]he public interest can be protected without the necessity of expending the time and money to hold a public hearing.” 1953 supplemental order, p. 4. Put another way, the Commission determined that a change in engineering design, such as increasing pipeline wall thickness, does not warrant a public hearing. However, in the immediate case, the Line 5 Project involves considerably more than a simple repair or a change in engineering design. Enbridge proposes to: (1) replace the Dual Pipelines with a new, 30-inch-diameter, single pipeline; (2) relocate the pipeline to a concrete-lined tunnel 60 to 250 feet below the lakebed of the Straits; (3) enter into a 99-year lease with the MSCA to operate and maintain the pipeline; and (4) decommission the Dual Pipelines. In addition, the Commission notes that the public has expressed a substantial amount of interest in the tunnel and the Line 5 Project—some indicating support for the project and others conveying concern that there may be a significant negative impact on the Great Lakes and the

environment. Therefore, the Commission is not persuaded that the public interest can be protected without conducting a public hearing.

In sum, the Line 5 Project proposes to replace the existing 20-inch-diameter Dual Pipelines with a new, 30-inch-diameter, single pipeline within a concrete-lined tunnel 60 to 250 feet below the Straits, under the terms of a new easement (2018 tunnel easement), and with a 99-year lease of public trust property. The Commission finds that, based on the above discussion, it is evident that the Line 5 Project differs significantly from what was approved in the 1953 orders and the 1953 easement and its amendment. Therefore, the Commission grants Enbridge's request for a declaratory ruling, but denies the requested relief because Enbridge does not have the requisite authority to construct the Line 5 Project pursuant to the 1953 orders, the 1953 easement, or the 1953 easement amendment.

The Commission notes that there were many comments regarding the tunnel. The issue of whether the tunnel is within the scope of the Commission's review under the Act 16 application is not material for the Commission's determination on this declaratory request.

## 2. Enbridge Energy, Limited Partnership's Request for Authority for the Line 5 Project

Enbridge states that, if its request for declaratory relief is denied, the Commission should, to the extent required by law, grant Enbridge the authority for the Line 5 Project. To begin, Enbridge argues that “[n]o provision in Act 16 requires additional authority to be obtained from the Commission to relocate[,] at the behest of the State[,] a small portion of the previously approved pipeline.” Enbridge's initial comments, p. 12. Similarly, Enbridge contends that Rule 447 does not require petroleum pipeline operators to file an application when a portion of an approved pipeline is being replaced, maintained, or relocated. *Id.* However, in the event the Commission finds that, pursuant to Act 16 and Rule 447, Enbridge must file an application for approval of the

Line 5 Project, Enbridge requests that the Commission approve its application on an *ex parte* basis.

The Commission notes that, as set forth in its title, the purpose of Act 16 “is to regulate the business of carrying or transporting, buying, selling, or dealing in crude oil or petroleum or its products” and “to provide for the control and regulation of all corporations, associations, and persons engaged in such business, by the Michigan public service commission . . . .” In addition, Section 1(2) of Act 16 states, in relevant part:

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

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

Pursuant to Section 8 of Act 16, the Commission has authority to make rules, regulations, and orders to give effect to and enforce the provisions of Act 16. Accordingly, Rule 447 was promulgated by the Commission, which states that:

(1) An entity listed in this subrule shall file an application with the commission for the necessary authority to do the following:

(a) A gas or electric utility within the meaning of the provisions of 1929 PA 69, MCL 460.501 to 460.506, that wants to construct a plant, equipment, property, or facility for furnishing public utility service for which a certificate of public convenience and necessity is required by statute.

(b) A natural gas pipeline company within the meaning of the provisions of 1929 PA 9, MCL 483.101 to 483.120, that wants to construct a plant, equipment, property, or facility for furnishing public utility service for which a certificate of public convenience and necessity is required by statute.

(c) A corporation, association, or person conducting oil pipeline operations within the meaning of 1929 PA 16, MCL 483.1 to 483.9, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute.

(2) The application required in subrule (1) of this rule shall set forth, or by attached exhibits show, all of the following information:

(a) The name and address of the applicant.

(b) The city, village, or township affected.

(c) The nature of the utility service to be furnished.

(d) The municipality from which the appropriate franchise or consent has been obtained, if required, together with a true copy of the franchise or consent.

(e) A full description of the proposed new construction or extension, including the manner in which it will be constructed.

(f) The names of all utilities rendering the same type of service with which the proposed new construction or extension is likely to compete.

(3) A utility that is classified as a respondent pursuant to R 792.10402 may participate as a party to the application proceeding without filing a petition intervene. It may file an answer or other response to the application.

As discussed above, Enbridge asserts that, based on the characteristics of the Line 5 Project, it is not required to file a new Act 16 application pursuant to Rule 447. Application, pp. 16-17. Enbridge argues that “[t]he activity contemplated by . . . [its] Application has never been considered ‘proposed new construction or extension’ of facilities under Rule 447 requiring an application.” *Id.*, p. 16.

The Commission finds that, in this case, Enbridge is not required to file an application pursuant to Rule 447(1)(a) or (b) because Enbridge is not a utility pursuant to Act 9, Act 69, or Rule 2b(m) and Line 5 does not provide utility service pursuant to Act 9 or Act 69. However, the Commission finds that, pursuant to the clear and unambiguous language of Rule 447(1)(c), Enbridge is a corporation conducting oil pipeline operations pursuant to Act 16 who seeks to construct the Line 5 Project to transport crude oil or petroleum products as a common carrier for which approval is required by statute. The language of Rule 447 does not distinguish between new construction of a pipeline facility and construction that replaces, maintains, or relocates an existing facility. Therefore, the Commission finds that, pursuant to Rule 447(1)(c), Enbridge is required to file an Act 16 application for approval of the Line 5 Project.

The Commission finds unpersuasive Enbridge’s argument that, when read as a whole, Rule 447 does not apply to the Line 5 Project and, therefore, Enbridge is not required to file an Act 16 application. According to Enbridge, the language “service to be furnished” in Rule 447(2)(c) is ambiguous. Enbridge contends that, if the other sections of Rule 447 are read in conjunction with subsection (2)(c), the application requirements in section (1) only apply to an entity providing future service in a new area. The Commission agrees with Bay Mills, the Environmental Coalition, and the Environmental and Tribal Groups that Enbridge is creating a future services limitation in Rule 447(2)(c) where none exists. Rule 447(2) states, in relevant part:

The application required in subrule (1) of this rule shall set forth, or by attached exhibits show, all of the following information:

\* \* \*

(c) The nature of the *utility service* to be furnished.

Rule 447(2)(c) (emphasis added). The Commission finds that, because Rule 447(2)(c) specifically refers to “utility service,” the requirement applies to utilities filing applications pursuant to

subsections (1)(a) and (b) of Rule 447. As discussed above, Enbridge is not a utility and Line 5 does not provide utility service. Therefore, the Commission finds that Enbridge's argument should be rejected.

Enbridge also argues that the "new construction" language in Rule 447(2)(e) is inapplicable because the Line 5 Project merely replaces and modestly relocates Line 5. The Commission disagrees and finds that the Line 5 Project is not simple maintenance or equivalent replacement of an existing pipeline. Rather, the Line 5 Project proposes to replace the 20-inch diameter Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel 60 to 250 feet beneath the lakebed of the Straits. Thus, the Commission finds that the Line 5 Project is new construction pursuant to Rule 447(2)(e).

Enbridge contends that Commission precedent also supports its claim that an Act 16 application is unnecessary, citing the September 12, 1997 order in Case No. U-11231 (September 12 order) and the January 20, 2011 order in Case No. U-16450 (January 20 order).

In Case No. U-11231, Michigan Consolidated Gas Company (Mich Con) extended the main line of its natural gas utility service into a new service area without first acquiring a CPCN from the Commission. In the September 12 order, the Commission found that Mich Con had violated Act 69 by extending its utility service before obtaining a CPCN. Because of mitigating circumstances, the Commission granted Mich Con a CPCN, noting that "there is some precedent for granting a certificate relating to facilities that have already been constructed." September 12 order, p. 9 (footnote omitted). However, the Commission stated that its "decision in this case should not be construed as an indication that it would adopt the same course of action in future cases presenting similar circumstances." *Id.*, p. 10. In the immediate case, the Commission finds

that the facts of Case No. U-11231 are insufficiently analogous and, in any event, it is clear that the Commission did not intend for the September 12 order to be considered precedential.

Enbridge asserts that, in the January 20 order, the Commission approved a memorandum of understanding between the Commission Staff (Staff) and Wolverine Pipe Line Company (Wolverine) that an Act 16 application is not required when there is a change in the type of petroleum transported by the pipeline. Enbridge's initial comments, p. 18, n. 3. While the Commission does not dispute Enbridge's description of the case, the Commission notes that, in the immediate case, Enbridge is not requesting a change in the type of petroleum that will be transported on Line 5. Rather, Enbridge is proposing to replace the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel 60 to 250 feet beneath the lakebed of the Straits, and to decommission the Dual Pipelines. Therefore, the Commission finds that the January 20 order has little precedential value in this case.

After a review of relevant cases, the Commission finds that there are two factors that have initiated the filing of a new application pursuant to Rule 447: (1) a change in pipe diameter (i.e., capacity) and (2) a relocation of the pipeline. However, the Commission finds that, to trigger the Rule 447 application requirement, it is sufficient that the proposed activity meet only one of the two factors; it is not necessary that it meet both.

In Case No. U-15251, Marathon Pipe Line LLC (MPL) filed an application, pursuant to Act 16, requesting authority to replace an approximate 29-mile segment of its existing 16-inch-diameter pipeline with a 24-inch-diameter pipeline for the transportation of crude oil and petroleum. MPL's application in Case No. U-15251, pp. 1, 4. In the June 26, 2007 order in Case No. U-15251, the Commission approved a settlement agreement, stating that it was necessary for MPL to replace its existing pipeline "to meet the increased demand for crude oil at the refinery and

to facilitate the transportation to the refinery of a heavier, more viscous Canadian crude oil allowing the refinery to optimize its access to this safe, reliable and economic source of crude oil.” Case No. U-15251, filing #U-15251-0025, p. 3. Therefore, because MPL was proposing to increase the capacity of its existing pipeline, a new Act 16 application was necessary.

In Case No. U-17020, Enbridge filed an Act 16 application requesting 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 was to replace certain 30-inch-diameter pipeline segments of its existing crude oil and petroleum pipeline known as Line 6B. As noted in the January 31 order, “the limitations on the current capacity of Line 6B could both be resolved favorably by the replacement of the remaining Line 6B segments as proposed in [Enbridge’s] application.” January 31 order, p. 7 (footnote omitted). In addition, Enbridge would “acquire up to 50 feet of new permanent right-of-way immediately adjacent to and abutting its existing Line 6B right-of-way so that it can maintain a 25-foot offset from the deactivated pipeline and the new pipeline, with another 20-foot buffer zone from the new pipeline to the edge of the new right-of-way.” *Id.*, pp. 9-10. Thus, in Case No. U-17020 Enbridge filed a new Act 16 application to increase the capacity of its pipeline and to change the route.

Although Case No. U-18166 involves Act 9, rather than Act 16, the Commission finds it sufficiently analogous to provide guidance and precedential support. In that case, Consumers filed a new Act 9 application requesting a CPCN and approval to replace approximately 52 miles of 12-inch-diameter and 16-inch-diameter natural gas pipeline with 24-inch-diameter pipeline, to abandon approximately 26 miles of 12-inch-diameter pipeline, and to install approximately 42 miles of 24-inch-diameter pipeline to replace segments that will be abandoned. Environmental Report, Exhibit D to Consumers’ application in Case No. U-18166, p. 5. On page 3 of the



March 28, 2017 order in Case No. U-18166, the Commission agreed with Consumers that “it is not feasible to follow the existing pipeline through Flint or Saginaw given the residential and commercial development that has occurred along that route since its installation in 1942.” Therefore, Consumers was required “to reroute the Proposed Pipeline around the urban areas west of Saginaw and east of Flint.” Consumers’ application in Case No. U-18166, p. 3. Once again, the Commission notes that a new application was necessary to obtain approval for increased pipeline capacity and to change the route.

Finally, while the Commission is aware of other recent examples in which no Act 16 approval was required, those cases have typically involved projects using existing easements and maintaining the same diameter pipeline.<sup>7</sup> Neither of those conditions are true in the case before us. Here, Enbridge proposes to replace the current 20-inch-diameter Dual Pipelines, not with identical 20-inch-diameter replacements, but with a new 30-inch-diameter pipeline, a change that is capable of increasing the volume of the pipeline. Similar to the situations in Case Nos. U-15251, U-17020, and U-18166 described above, the change to the pipeline diameter proposed by Enbridge triggers the need for an Act 16 review. In addition, the proposed project would not utilize an existing easement, but would be relocated in a new tunnel with a new easement of its own—one that was created under Act 359 specifically for this new project. This is

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<sup>7</sup> In 2010, Enbridge proposed to replace a segment of Line 6B that crosses the St. Clair River near Marysville, Michigan. Enbridge affirmed to the Staff that there was no change in the diameter or capacity of the pipeline and no Act 16 application was filed. In 2015, due to pipeline integrity issues, Wolverine proposed to replace a portion of pipeline that crosses Lake Macatawa in Michigan. There was no change in the diameter or capacity of the pipeline and no Act 16 application was filed. In 2019, Kinder Morgan, Inc., proposed to replace the 10-inch-diameter pipeline that crosses the Detroit River with a 12-inch-diameter pipeline. After being advised that the proposal would have required a new Presidential Permit for crossing the United States/Canada border, Kinder Morgan replaced the segment with a like-for-like 10-inch-diameter pipeline. No Act 16 application was filed.

a significantly greater deviation in route than was at issue in either Case No. U-17020 or Case No. U-18166, both of which required a new application. With its potentially increased capacity and housed within a tunnel occupying a new easement, the proposed line is substantially different from those examples in which no Act 16 approval was needed. As such, Enbridge has failed to demonstrate why its requested relief through a declaratory ruling is appropriate in this context, or why its proposal should not trigger the need for an application under Act 16.

Enbridge claims that, if an application is required for the Line 5 Project, it will create adverse and burdensome policy that will require applications for all types of pipeline activity, including maintenance of an existing pipeline or electric facility. The Commission disagrees. Act 16 and Rule 447 focus on pipeline “construction.” *See*, MCL 483.2, 483.2a, 483.2b, and 483.6; Rule 447(1)(a), (1)(b), (1)(c), (2)(e), and (2)(f). The word “construct” should be understood as it is ordinarily used. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000) (words should be given “their common and ordinary meaning.”). The ordinary meaning of “construct” is “to make or form by combining or arranging parts or elements; build.” MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/construct> (last visited June 23, 2020). A common understanding of the word “construction” does not extend to mere maintenance. As defined by Merriam-Webster, to “maintain,” is “to keep in an existing state (as of repair, efficiency, or validity).” *Id.* Maintenance repairs what has already been built or rebuilds it to mirror the original. Maintenance on a pipeline, such as replacing its coating, is not construction because it does not “make or form” anything. Thus, the Commission finds that not all pipeline activity requires an Act 16 application under Rule 447; rather, the two factors that commonly require a new application are construction activities that alter the major attributes of a pipeline, such as a change in diameter or relocation of the pipeline.

The Commission finds that the Line 5 Project is not mere maintenance because Enbridge is not proposing to rebuild Line 5 as it was originally constructed. The Line 5 Project proposes new construction to replace the existing 20-inch-diameter Dual Pipelines with a new, 30-inch-diameter single pipeline. Although Enbridge contends that the Line 5 Project will not increase the annual average operational capacity of Line 5, Enbridge failed to provide facts in its application specifying the maximum capacity of Line 5 after the project is complete. The Commission finds that, by increasing the diameter of the segment that crosses the Straits, it is reasonable to conclude that it could potentially allow Enbridge to increase capacity in the future.

In addition, Enbridge proposes to relocate the portion of Line 5 that crosses the Straits from atop the lakebed to a tunnel 60 to 250 feet below the lakebed, which will be constructed in a new easement issued by the State of Michigan. As discussed above, this is a significant change in location and route of the Line 5 pipeline. Therefore, based on the factors listed above and relevant Commission precedent, the Commission finds that an Act 16 application is required to obtain approval for the Line 5 Project.

Next, Enbridge contends that, because there is no requirement in Act 16 or Rule 447 that the Commission conduct a contested case, the Commission should approve Enbridge's Act 16 application on an *ex parte* basis. Enbridge states that the Commission "has a 'longstanding practice' of not requiring contested case proceedings in Act 9 applications filed under Rule 447" and, accordingly, should not require a contested case in this Act 16 proceeding. Enbridge's initial comments, p. 4, n. 1. Enbridge cites the February 12, 2004 order in Case No. U-13874 (February 12 order) and September 24, 2013 order in Case No. U-17478 (September 24 order) in support.

In the February 12 order, the Commission granted Wilderness-Chester Limited Partnership (Wilderness) *ex parte* approval to operate the Half Moon Pipeline pursuant to Act 9. Mich Con filed a petition for rehearing alleging “that the Half Moon Pipeline will interfere with Mich Con’s operations, CO<sub>2</sub> [carbon dioxide] treatment arrangements, and contractual obligations” and that the Commission should have conducted a contested case prior to approving Wilderness’ Act 9 application. February 12 order, p. 2. The Commission disagreed, stating that “Act 9 does not entitle a potential competitor of a proposed pipeline to demand a contested case hearing” and that “many pipeline applications are granted without the necessity of a hearing.” *Id.*, p. 4, quoting the March 29, 1995 order in Cases Nos. U-10547 and U-10580, p. 12.

According to Enbridge, in the February 12 order, the Commission confirmed that it has an established practice of granting *ex parte* approval of Act 9 applications and, therefore, Enbridge contends that the practice should extend to all applications filed under Rule 447. However, the Commission notes that the February 12 order specifically states that “the Commission’s longstanding practice is to grant ***most routine*** Act 9 pipeline certificates, including the one in this case, on an *ex parte* basis.” February 12 order, p. 4 (emphasis added). The Commission finds that, in Enbridge’s summary of the February 12 order, it omitted two critical words, “most” and “routine,” and, thus, mischaracterized the scope of the February 12 order. In addition, the Commission finds that, unlike the pipeline at issue in Case No. U-13874, there is nothing “routine” about the Line 5 Project. It involves the replacement of the Dual Pipelines with a new, 30-inch-diameter, single pipeline to be relocated within a new concrete-lined tunnel 60 to 250 feet beneath the lakebed of the Straits, and decommissioning of the Dual Pipelines.

Turning to Case No. U-17478, the Commission finds that it relates back to the application filed in Case No. U-17020, in which Enbridge requested Act 16 approval to replace and relocate

certain segments of its existing Line 6B pipeline. In Case No. U-17478, Enbridge filed a new Act 16 application, requesting authority to construct a small portion of new 30-inch-diameter pipeline along an alternative route to avoid a portion of a residential neighborhood. In the September 24 order, the Commission stated that “Enbridge has demonstrated community support for the alternative route and that it has obtained the necessary property rights to construct along the alternative route.” September 24 order, p. 2. Thus, in the September 24 order, the Commission found that the proposed alternative route was in the public interest and that *ex parte* approval was appropriate. By contrast, in the immediate case, Enbridge has not demonstrated unified community support for the Line 5 Project and has yet to obtain all of the permits to construct the project beneath the lakebed of the Straits. Therefore, the Commission finds that the September 24 order does not support a grant of *ex parte* approval in this case.

Pursuant to the Commission’s Rules of Practice and Procedure, R 792.10401 *et seq.*, the Commission has broad discretion to set any matter for a contested case where not prohibited by law. Nothing in Act 16 or Rule 447 prohibits the Commission from conducting a contested case proceeding on Enbridge’s Act 16 application for approval to construct the Line 5 Project. In addition, Rule 415(1) states that “[a] contested case proceeding shall be held when required by statute and may be held when the commission so directs.” In this case, the Commission finds that Enbridge’s Line 5 Project involves significant factual and policy questions and complex legal determinations that can only be resolved with the benefit of discovery, comprehensive testimony and evidence, and a well-developed record in a contested case proceeding. Moreover, due to the significant public interest and concern regarding the Line 5 Project’s potential environmental impact on the Great Lakes, the Commission finds that it is in the public interest to conduct a

contested case proceeding. Therefore, the Commission finds that Enbridge's request for *ex parte* approval of its Act 16 application should be denied and the matter should be set for hearing.

The notice of hearing with further instructions regarding the date, time, and location of the prehearing will be forthcoming. Commencing on the date of the notice of hearing, the Commissioners are not permitted to "communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate." MCL 24.282.

Given the significance of this proceeding and the novel legal questions that may arise, the Commission plans to read the record. The Commission recommends that the administrative law judge (ALJ) set a schedule that would conclude the evidentiary portion of the proceeding and briefing approximately 10 months from the date of the prehearing conference. In providing this guidance, the Commission recognizes that significant developments may arise that could affect the schedule and scope of the proceeding and, therefore, looks to the ALJ to work with the parties to make appropriate adjustments to this general timeframe without seeking approval from the Commission. Following legal briefing, the Commission will then review the full record and render a decision in a timely manner thereafter, recognizing the importance of providing certainty on this major infrastructure proposal.

Opportunities for interested parties and members of the public to participate and present evidence, arguments, and comments in this proceeding are of utmost importance to the Commission. Interested persons may seek to intervene to participate as a party in the formal, evidentiary hearing process. Requests for intervention will be evaluated by the ALJ based on the Commission's standards for intervention, which include intervention by right and permissive intervention. In a proceeding that "raises novel questions and important issues of policy," the

Commission may permit intervention when it will “bring a unique perspective to the issues raised by the case.” June 5, 1996 order in Case No. U-11057, pp. 2-3.

The Commission recognizes the cost burden for parties to participate in proceedings of this nature and encourages parties to align positions and coordinate on the presentation of evidence as appropriate and feasible. This also provides the Commission with consolidated evidence and argument from the parties. The quality of the evidence and argument (i.e., depth and breadth of issues addressed and the support given to expert opinion and analyses), rather than the quantity of intervenor support, is most important for the Commission to make an informed decision.

Beyond the formal hearing process, the Commission is planning efforts to provide opportunities for the public to comment through a variety of means. Written comments may be filed during the pendency of this case and should reference Case No. U-20763. Address mailed comments to: Executive Secretary, Michigan Public Service Commission, 7109 W. Saginaw Hwy., Lansing, MI 48917. Electronic comments may be emailed to [mpscdockets@michigan.gov](mailto:mpscdockets@michigan.gov). If you require assistance prior to filing, contact the Staff at (517) 284-8090 or by e-mail at [mpscdockets@michigan.gov](mailto:mpscdockets@michigan.gov). All information submitted to the Commission in this matter will become public information available on the Commission’s website and subject to disclosure; and all comments will be filed in Case No. U-20763.

In addition, the Commission plans to hold one or more public hearings attended by the Commissioners to receive public comment. The Commission will hold a public hearing on August 24, 2020, with details forthcoming in a formal notice to be filed in this docket and shared through other communications, such as the Commission’s dedicated Line 5 webpage and e-mail

distribution list.<sup>8</sup> In the latter part of July, the Staff will be posting on the Line 5 website a presentation summarizing Enbridge's Act 16 application and explaining the Commission's role and process. Although the Commission would prefer to hold public hearings near the proposed Line 5 Project, the Commission will monitor the coronavirus pandemic developments and evaluate whether and how to hold additional public hearings at a later date.

THEREFORE, IT IS ORDERED that:

A. Enbridge Energy, Limited Partnership's request for a declaratory ruling is granted and the requested relief is denied.

B. Enbridge Energy, Limited Partnership's request for *ex parte* approval of its application filed pursuant to 1929 PA 16, MCL 483.1 *et seq.*, and the Commission's Rules of Practice and Procedure, Mich Admin Code, R 792.10447, is denied.

C. A contested case proceeding is directed on Enbridge Energy, Limited Partnership's application filed pursuant to 1929 PA 16, MCL 483.1 *et seq.* The notice of hearing with further instructions regarding the date, time, and location of the prehearing is forthcoming and will be filed in this docket.

D. A public hearing shall be held on August 24, 2020. A notice for the public hearing is forthcoming and will be filed in this docket.

E. The public hearing will be legislative in nature and any person may present data, views, questions, and arguments regarding the issue. Statements may be limited in duration by the presiding officer in order to ensure that all interested parties have an opportunity to participate in

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<sup>8</sup> Interested persons are encouraged to visit [www.michigan.gov/MPSCLine5](http://www.michigan.gov/MPSCLine5) for up-to-date case information, instructions for applying to participate in the case, and subscription instructions to receive e-mail updates.



the proceedings. If necessary, the proceeding will continue on such dates as the presiding officer may schedule until all persons have had a reasonable opportunity to be heard.

F. Any person may file written comments, suggestions, data, views, questions, and argument during the pendency of this case. All information submitted to the Commission in this matter will become public information available on the Commission's website and subject to disclosure; the comments should reference Case No. U-20763.

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. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel.

Electronic notifications should be sent to the Executive Secretary at [mpscedockets@michigan.gov](mailto:mpscedockets@michigan.gov) and to the Michigan Department of the Attorney General - Public Service Division at [pungpl@michigan.gov](mailto:pungpl@michigan.gov). In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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Daniel C. Scripps, Commissioner

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Tremaine L. Phillips, Commissioner

By its action of June 30, 2020.

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Lisa Felice, Executive Secretary

# PROOF OF SERVICE

STATE OF MICHIGAN )

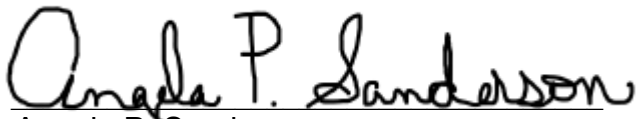
Case No. U-20763

County of Ingham )

Brianna Brown being duly sworn, deposes and says that on June 30, 2020 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

  
Brianna Brown

Subscribed and sworn to before me  
this 30<sup>th</sup> day of June 2020.



Angela P. Sanderson  
Notary Public, Shiawassee County, Michigan  
As acting in Eaton County  
My Commission Expires: May 21, 2024

**Service List for Case: U-20763**

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