STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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

THE MICHIGAN PUBLIC SERVICE COMMISSION STAFF'S RESPONSE OPPOSING ENBRIDGE ENERGY, LP'S PETITION FOR REHEARING

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I. Introduction

Enbridge Energy, LP asks the Commission to reconsider its June 30, 2020 order holding that Enbridge does not have authority, under the Commission's 1953 order first authorizing Line 5, to replace the dual oil pipelines that currently run through the Straits of Mackinac. In its Petition for Rehearing, Enbridge disputes the Commission's finding that Enbridge is not a "public utility" as this term is used in Rule 447 of the Commission's Rules of Practice and Procedure. But Enbridge has relied on definitions of "utility" in statutes that have no bearing on whether a utility, natural gas company, or oil pipeline company must file an application for a proposed construction project. The Commission, by contrast, correctly interpreted "utility" consistent with definitions of the term in statutes that Rule 447 incorporates by reference.

Enbridge places uncommon significance on its supposed status as a public utility. The definition of "public utility" was not pivotal to the Commission's holding that Enbridge lacked authority for its proposed project under the Commission's 1953 order. Regardless of whether Enbridge is a public utility under Rule 447, the undisputed facts establish that Enbridge is in the business of "conducting oil pipeline operations" and that it "wants to construct facilities to transport crude oil or petroleum." Mich Admin Code, R 792.10447(1)(c). This means, under Rule 447(1)(c), that Enbridge must file an application for the pipeline construction regardless of how it is classified. This interpretation is consistent with the plain language in Rule 447(1)(c), which governs when an oil pipeline company must file

an Act 16 application. And this plain language controls when considering the drafters' intent.

Enbridge also argues that the term "construction" in Rule 447(1)(c) should be interpreted to mean "new construction or extension" since this more specific phrase is used in Rule 447(2) establishing application content requirements. But the plain language of Rule 447(1)(c) is not superseded by these content requirements. And even if it were, Enbridge's proposed $500 million project is "new construction." Enbridge proposes to decommission the existing dual pipelines on the Straits' lakebed and replace them with a single pipe that runs through a tunnel Enbridge plans to bore 60 to 250 feet beneath the Straits. If the project cannot be considered "new construction" and is instead classified as "maintenance" like Enbridge proposes, it would distort the meaning of "maintenance" beyond any semblance of its dictionary definition.

At the heart of the Commission's June 30, 2020 order is its holding that Enbridge should not be allowed to rest exclusively on the laurels of a 70-year-old order to bury a pipeline that ships about 540,000 barrels of crude oil under our State's largest freshwater resource daily. Enbridge's Petition does nothing to undermine this fundamental holding. If Enbridge wishes to proceed with a project of this magnitude, state law requires it to demonstrate to the Commission that the project is needed, well-designed, safely constructed, and the best alternative.

II. **Standard of Review**

Rule 437 of the Commission's Rules of Practice and Procedure describes the requirements that a party must meet when petitioning for rehearing. Mich Admin Code, R 792.10437(1). Among other things, the Rule allows a party to petition for rehearing based on a claim of error. (*Id.*) A party may also petition for rehearing if it discovers new evidence that circumstances have changed since the close of the record or if the party learns that an order will have unintended consequences:

> A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error. A petition for rehearing based on a claim of newly discovered evidence, on facts or circumstances arising subsequent to the close of the record, or on unintended consequences resulting from compliance with the decision or order shall specifically set forth the matters relied upon. [Mich Admin Code, R 792.10437(1).]

As the Commission has summarized this rule, "Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing." *In re Cherryland Electric Coop's Application for a Large Resort Service Rate*, MPSC Case No. U-13716, 10/14/2004 Order, p 2.

A petitioner must add something new to the discussion to be successful; it may not merely repeat arguments that have already been rejected. *In re Consumers Energy Co's 2004 Power Supply Cost Recovery Plan*, MPSC Case No. U-13917, 8/1/2005 Order, p 4 ("[A]n application for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision.").

III. **Argument**

Enbridge has not shown that it is a public utility for Rule 447 purposes. Most Michigan statutes, including the statutes that Rule 447(1) incorporates by reference, that define "public utilities" do not define the term to encompass pipeline companies. At a minimum, this shows that the term can mean different things in different contexts. In Rule 447(1), the terms "utility" and "public utility service" are used to refer to electric and gas companies and the services they provide, but not to refer to oil pipeline companies or their services. Compare Mich Admin Code, R 792.10447(1)(a) with Mich Admin Code, R 792.10447(1)(c). If the Commission had intended to classify oil pipeline companies as utilities when it promulgated these rules, it would have done so in the same way it described electric and gas companies as utilities.

Ultimately, as described below, the Commission's holding does not hinge on whether Enbridge is a public utility. If the Commission were to reverse its holding on this question, it would not free Enbridge of its obligation to file an Act 16 application under Rule 447(1)(c)'s plain language. This language, which controls when an applicant must file an application with the Commission to construct a facility, supersedes Rule 447(2)'s content requirements. If the Commission were to reverse its holding that Enbridge is a public utility, it would simply mean that certain content requirements apply that otherwise would not apply. The Commission should, therefore, affirm its June 30, 2020 order or, in the alternative, hold that Enbridge's status as a public utility does not affect its obligation to file an Act 16 application.

The Commission should also reject Enbridge's rehearing arguments on procedural grounds because Enbridge is repeating arguments that the Commission already rejected in its June 30, 2020 order. Although Enbridge bases its Petition on an alleged claim of error—that Enbridge is a public utility under Rule 447—Enbridge's claim of error is largely grounded in arguments the Commission already rejected. (Compare Enbridge's 5/13/2020 Comments in Support of its Request for Declaratory Relief, pp 13–17, with Enbridge's Petition for Rehearing, pp 7–11.) In fact, when the arguments in Enbridge's Petition are compared to the arguments in its previous filings in this case, it is evident that Enbridge's claims about its status as a utility are mere pretense to recast its earlier arguments into a new mold. These arguments are no better now than they were before.

A. Enbridge is not a public utility under Rule 447 and, even if it were, it would not free Enbridge of its obligation to file an Act 16 application.

When interpreting Rule 447, the Commission should apply the rules of statutory construction. *City of Coldwater v. Consumers Energy Co.*, 500 Mich 158, 167 (2017) ("In construing administrative rules, courts apply principles of statutory construction."). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *In re MCI Telecommunications Complaint*, 460 Mich 396, 411 (1999). "Statutory interpretation begins with examining the plain language of the statute. When that language is clear and unambiguous, no further judicial construction is required or permitted." *In re Reliability Plans of Elec Utilities,* ___Mich___; ___ NW2d ___ (2020) (Docket Nos. 158305–158308); slip

op at 11. If the meaning of a statute is in question, "[A] court must look to the object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose." *In re Forfeiture*, 432 Mich 242, 248 (1989).

Rule 447(1) requires certain entities to file an application if they want to construct a plant, equipment, property, or facility. The Rule distinguishes between utilities and pipeline owners:

> (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. [Mich Admin Code, R 792.10447(1) (emphasis added).]

Rule 447(2) then goes on to describe what these entities should include in an application. It carries forward the distinction between utilities and pipeline companies by referring to them both generically as "applicants" and by referring to "utility service" or "utilities" when seeking information specific to utilities. Mich

Admin Code, R 792.10447(2). The Rule also describes a proposed project as a "new construction or extension":

> (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. [[Mich Admin Code, R 792.10447(2) (emphasis added).]

Enbridge noted, in support of its request for a declaratory ruling, that Rule 447(1) must be read in context with Rule 447(2) and argued that alleged limitations in Rule 447(2) that govern what must be included an application should also limit Rule 447(1) that governs when an application must be filed. For example, since Rule 447(2)(d) requires applicants to identify the "utility service ***to be*** furnished" in an application, Enbridge argues Rule 447(1)(c) does not require applicants to file an application when they are replacing existing infrastructure to continue an ongoing service. (Enbridge's Petition, pp 9–10.) Rather, according to Enbridge, an application is required only when an applicant plans to offer a new service in the future. Likewise, because Rule 447(2)(e) and (f) refer to a "proposed new construction or extension," Enbridge argues that an application is not required

under Rule 447(1) for work performed to maintain or replace an existing pipeline or facility. (*Id*. at 4, 10–11.) Instead, as Enbridge sees it, an application is needed only for work that qualifies as new construction or an extension of existing infrastructure.

The Commission addressed each of Enbridge's arguments separately. First, concerning Enbridge's reliance on Rule 447(2)(d) requiring applicants to identify the "utility service to be furnished," the Commission reasoned 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." (6/30/2020 Order, pp 61–62.) Since "Enbridge is not a utility and Line 5 does not provide utility service," Enbridge does not have to file an application under these subsections but instead must file under subsection 1(c) that governs oil pipeline companies. (*Id*.) The Commission held, "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." (*Id*. at 61.) The Commission agreed with the Environmental and Tribal Groups' interpretation of Acts 9 and 69, as well as Rule 2b(m), which define "utility" in a way that excludes pipeline companies from the definition:

> 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. [*Id*. at 46.]

Second, although Enbridge claimed it did not need to file an Act 16 application because its proposed project "modestly relocates" approximately four miles of pipeline and is not "new construction or [an] extension," (Enbridge's Application, ¶ 43), the Commission was not persuaded by this reductionist description. "[T]he Line 5 Project," the Commission said, "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." (6/30/2020 Order, p 58.) Given this significant change to the pipeline's features and route, the Commission found that the project "is not simple maintenance or equivalent replacement of an existing pipeline" but is new construction. (*Id*. at 62.)

Enbridge responds that the Commission wrongly concluded that it is not a public utility and that this alleged error somehow tainted the rest of the Commission's analysis. (Enbridge's Petition, pp 1–2.) As described below, however, Enbridge does not consider the entire body of law governing utilities and pipeline companies. And, more importantly, Enbridge fails to recognize that even if it is right about its status as a public utility, this does not free it from its obligation to file an Act 16 application. Rather, its status as a public utility would merely mean

that it must include more information in its application, under Rule 447(2), than it would as a pipeline company. Enbridge's status as a public utility (if Enbridge were correct) would not alter the Commission's holding that its proposed project is new construction.

1. **Enbridge is not a public utility.**

To support its position that it is a public utility, Enbridge relies on two statutes. It first cites the Michigan Public Service Commission Act of 1939, (Enbridge's Petition, pp 5–6), which provides that the Commission is "granted the power and jurisdiction to hear and pass upon all matters pertaining to . . . public utilities, including electric light and power companies, . . . oil, gas, and pipeline companies . . . ." MCL 460.6(1). It next relies on the Cost of Regulating Public Utilities Act, (Enbridge's Petition, p 6), which says, "Any public utility over which the commission has jurisdiction solely pursuant to . . . Act No. 16 of the Public Acts of 1929, as amended, . . . shall pay fees as prescribed by the commission in lieu of any assessment under the provisions of this act." MCL 460.119.

Neither of these are statutes that Rule 447 incorporates by reference. Subsection (1)(a) refers to a gas or electric utility "*within the meaning of* the provisions of 1929 PA 69, *MCL 460.501 to 460.506*," while Subsection (1)(b) refers to a natural gas pipeline company "*within the meaning of* the provisions of 1929 PA 9, *MCL 483.101 to 483.120*," and Subsection 1(c) refers to an oil pipeline company "within the meaning of 1929 PA 16, *MCL 483.1 to 483.9*." Mich Admin Code, R 792.10447(1) (emphasis added). This is why the Commission focused on these Acts

when interpreting the term "utility," which makes sense. If the drafters had intended to incorporate the definitions from the statutes that Enbridge cites, the drafters clearly knew how to do so.

The Commission's decision, when interpreting terms used in Rule 447, to focus on definitions that Rule 447 incorporates by reference is similar to how the Court of Appeals interpreted terms in the Single Business Tax Act (SBTA). After noting that "[m]any sections of the SBTA imported definitions from other statutes," like the General Property Tax Act (GPTA), it found that the Legislature's decision not to import the GPTA's definition for "industrial personal property" meant that an independent assessment was not needed to determine whether taxpayers' property met the definition:

> It follows, then, that ***if the Legislature, in drafting the SBTA, had wished to import the definition of "industrial personal property" from the GPTA, it would have chosen to say, as it did throughout the SBTA, " 'Industrial personal property' means that term as defined in section 34c of the general property tax act," or something similar.*** Instead, the Legislature chose to define "industrial personal property" as "personal property *classified* as industrial personal property *under* section 34c of the general property tax act...." Section 34c of the GPTA contains not only a definition of "industrial personal property," but also imposes on assessors a duty to classify property under that section. The most reasonable inference to be drawn from the Legislature's use of this language is that it intended to allow respondent to rely on the assessor's classification of property under MCL 211.34c(1) and did not intend to require respondent to make an independent assessment of whether taxpayers' property met the definition in MCL 211.34c(3). [*Walter Toebe Const Co v Dep't of Treasury*, 289 Mich App 659, 661–662 (2010) (emphasis added and citations omitted).]

The Commission was also right to note the absence of pipeline companies from the definitions that Rule 447 incorporates by reference. The Michigan

Supreme Court reached a similar conclusion when noting that the definition of "utility" in Rule 102 of the Commission's Technical Standards for Electric Service did not include municipally owned utilities. Rule 102 defines "utility" as "an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission." Mich. Admin. Code, R. 460.3102(n).[1] According to the Court, the absence of any mention of municipally owned utilities meant that the Rule did not apply to these utilities:

> This definition notably does not include municipally owned utilities. The application of the canon of statutory interpretation *expressio unius est exclusio alterius* [the express mention of one thing excludes other similar things] directs us to read this absence as meaningful, especially in light of the lack of any language that would suggest that this was intended to be an illustrative, rather than an exclusionary, list. ***Given that Rule 411(11) makes no specific reference to municipal electric utilities and speaks only to a "utility," a plain-language reading of that rule leads to the inevitable conclusion that it does not apply to municipal electric utilities.*** Any other interpretation would render Rule 102(*l*) nugatory. [*City of Coldwater v Consumers Energy Co*, 500 Mich 158, 170–71 (2017) (emphasis added).]

As this case illustrates, and the entire body of energy law corroborates, the term "utility" means different things in different contexts. Consider the many varied definitions of the terms "utility," "public utility," "power utility," "natural gas utility," "electric utility," and "covered utility":

- " 'Utility' means any public utility subject to the regulation and control of the commission that owns or controls, or shares ownership or control of poles, ducts, or conduits used or useful, in whole or in part, for supporting or enclosing wires, cables, or other facilities or apparatus for the transmission of writing, signs, signals, pictures, sounds, or other forms of

[1] When the Supreme Court issued its opinion, the definition of "utility" appeared in Rule 102(*l*) rather than in 102(n) where it currently resides.

intelligence, or for the transmission of electricity for light, heat, or power." MCL 460.6g(1)(d).

- " 'Utility' means a steam distribution company regulated by the commission." MCL 460.6r(1)(d).

- " 'Natural gas utility' means an investor-owned business engaged in the sale and distribution of natural gas within this state whose rates are regulated by the commission." MCL 460.9(1)(e).

- " 'Utility' means an electric or natural gas utility regulated by the public service commission." MCL 460.9d(9)(g).

- " 'Covered utility' means an electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 or an electric utility subject to the rate provisions of commission orders in case numbers U-11181-R and U-12204." MCL 460.10d(10)(b).

- " 'Electric utility' means that term as defined in section 2 of the electric transmission line certification act, 1995 PA 30, MCL 460.562." MCL 460.10h(c).

- " 'Utility' means an electric, steam, or natural gas utility regulated by the commission." MCL 460.10ee(16)(a).

- " 'Public utility' means a steam, heat, electric, power, gas, water, wastewater, telecommunications, telegraph, communications, pipeline, or gas producing company regulated by the commission, whether private, corporate, or cooperative, except a municipally owned utility." MCL 460.111(c).

- "The term 'public utility', when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state 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." MCL 460.501.

- " 'Electric utility' means a person, partnership, corporation, association, or other legal entity whose transmission or distribution of electricity the commission regulates under 1909 PA 106, MCL 460.551 to 460.559, or 1939 PA 3, MCL 460.1 to 460.10cc. Electric utility does not include a municipal utility, affiliated transmission company, or independent transmission company." MCL 460.562(e).

- " 'Power utility' means any person engaged or that may engage, inside or outside the state, in generating, transmitting, or distributing or furnishing electricity." MCL 460.806(2).[2]

Given the many varied definitions of these terms, statutory language referring to a "utility" or "utilities" cannot be properly interpreted without resorting to the correct statutory definition as a guide. The Commission did this by relying on the statutory definitions that Rule 447 adopted by reference. By contrast, Enbridge relies on definitions from statutes that have no bearing on whether a Rule 447 application is needed. It first relies on the definition of "utility" in MCL 460.6(1), (Enbridge's Petition, pp 5–6), which is a statutory provision that the Supreme Court has held is not "a grant of specific authority or powers." *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 147 (1988).

Enbridge also relies on the definition of "utility" in the Cost of Regulating Public Utilities Act, Public Act 299 of 1972, (Enbridge's Petition, p 6), which is a definition listed above that defines "public utility" as "a steam, heat, electric, power, gas, water, wastewater, telecommunications, telegraph, communications, pipeline, or gas producing company regulated by the commission, whether private, corporate, or cooperative, except a municipally owned utility." MCL 460.111(c). This is one of the broadest definitions of "utility" in all of energy law, presumably because it is

[2] If the definitions for "utility" in the administrative rules were added to this list, it would expand it even further. And this is not to mention the definitions for "provider," "natural gas provider," and "electric provider" that are sometimes used interchangeably with "utility." See MCL 460.6w(12)(c); MCL 460.9m(3); MCL 460.9o(3)(b); MCL 460.9q(23)(d); MCL 460.1005(a); and MCL 460.1009(a) and (d). These terms further illustrate the importance of using the right definition when interpreting statutes and administrative rules in this area of the law.

designed to ensure that all entities who are regulated by the Commission pay an assessment or fee to cover their regulatory costs. Given the purpose of Act 299 is entirely unrelated to Rule 447's requirements, the definitions in Act 299 are a poor substitute for the definitions that Rule 447 actually incorporates by reference. The Court of Appeals said it best:

> As recognized in *Grimes v. Mich. Dep't. of Transp.,* 475 Mich. 72, 85, 715 N.W.2d 275 (2006), "***reliance on an unrelated statute to construe another is a perilous endeavor to be avoided by our courts***." FOIA and the APA are self-contained in that they do not refer to one another, and both statutes contain their own definitions of terms. Because the issue now before this Court pertains to the status of the MCCA under FOIA, ***it would be improper to extrapolate and expand the definition*** of a public body under FOIA to coincide with the APA's definition of a state agency ***because there is nothing in the statutory language to suggest that the relevant statutory provisions are or were intended to be construed in the same manner given their divergent and specific definitions and purposes***. [*Coal Protecting Auto No-Fault v Michigan Catastrophic Claims Ass'n*, 317 Mich App 1, 19 (2016).]

In the same way, relying on Act 299's definitions to understand terms in Rule 447 would be a "perilous endeavor." There is nothing in Act 299 or Rule 447 to suggest they were intended to be construed the same way given their unrelated definitions and purposes.[3]

The use of the word "utility" in Rule 447(1) further supports the Commission's holding. Rule 447(1)(a) refers to a "gas or electric ***utility***," and Rule

[3] In a footnote, Enbridge relies on MISS DIG Underground Damage Prevention and Safety Act, the Uniform Commercial Code, and criminal statutes that it claims support its position that it is a utility. (Enbridge's Petition, p 6 n3.) These statutes' purposes are even further afield from the purpose of Rule 447 than the cases Enbridge cites in the body of its Petition. The definitions in these statutes do nothing to help Enbridge's case.

447(1)(b) refers to a "natural gas pipeline company that wants to construct a . . . facility for furnishing public ***utility*** service." Mich Admin Code, R 792.10447(1)(a) and (b) (emphasis added). The term "utility," however, does not appear anywhere in subsection (1)(c), which instead refers to a "corporation, association, or person conducting oil pipeline operations . . . that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier." Mich Admin Code, R 792.10447(1)(c). This absence cannot be overlooked. See *In re AJR*, 300 Mich App 597, 600 (2013) ("[T]his Court may not ignore the omission of a term from one section of a statute when that term is used in another section of the statute.").

If the Rule 447 drafters intended to classify oil pipeline companies as "utilities" or their service as "utility service," they demonstrated they knew how to do so. Instead, they classified oil pipeline companies as "common carriers." To hold that Enbridge is a public utility would violate the rule of statutory construction that requires agencies and courts to give weight to the drafters' choice of words.

2. Even if Enbridge were considered a public utility, it would not free Enbridge of its obligation to file an Act 16 application.

Rule 447(1) distinguishes between gas and electric utilities, natural gas pipeline companies, and oil pipeline companies, and it tells these entities when they must file applications to construct certain facilities. Rule 447(1)(c) requires an oil pipeline company to file an Act 16 application if it "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." Mich Admin Code, R 792.10447(1)(c) (emphasis added). This is consistent with the Act 16 provision that requires pipeline companies to file a new plat when a "trunk line or trunk lines are proposed to be ***constructed***." MCL 483.6 (emphasis added). This plain language must be given its clear and unambiguous meaning. *In re Reliability Plans of Elec Utilities,* ___Mich at ___; slip op at 11 ("Statutory interpretation begins with examining the plain language of the statute. When that language is clear and unambiguous, no further judicial construction is required or permitted.").[4]

The plain language in Rule 447(1) leaves no room to resort to the rules of statutory construction. Enbridge nonetheless resorts to these rules to argue that it is not a public utility and need not file a new Act 16 application for its proposed project. Enbridge claims that Rule 447(1) must be interpreted in light of Rule 447(2) and that Rule 447(2)(c) applies to future utility service. According to Enbridge, because Line 5 already provides a utility service, it does not need to file an application to provide the same service. (Enbridge's Petition, pp 2–3, 9–11.) Enbridge also notes that Rule 447(2)(f) requires it to provide the names of all utilities rendering the same type of service that Enbridge will be competing against, suggesting that there is a new service generating new competition. (*Id*. at 11.)

[4] Michigan courts also apply the same rule to administrative rules. See, e.g., *Gen Motors Corp v Bureau of Safety & Regulation*, 133 Mich App 284, 292 (1984) ("[I]f an agency rule or standard is unambiguous on its face, no interpretation is necessary. This Court must give effect to the agency's intention as clearly expressed in its regulation.").

Enbridge concludes that because Rule 447(2) envisions a new service, whereas Line 5 is already providing a service that allegedly will not change, Enbridge does not have to file an Act 16 application under Rule 447(1) for its replacement and relocation project.

Enbridge's argument that Rule 447(2) frees it of its obligation under 447(1) requires more than the context that Rule 447(2) adds. Reading a rule in context does not require importing limitations from another subsection that serves a different purpose. See *Coal Protecting Auto No-Fault*, 317 Mich App at 19 ("[T]here is nothing in the statutory language to suggest that the relevant statutory provisions are or were intended to be construed in the same manner given their divergent . . . purposes."). This is true here where Rule 447(1) addresses when a utility or pipeline company must file an application, while Rule 447(2) explains the information that must be included in an application. There is no reason to believe that the drafters intended the content requirements to be a limit on who must file an application or when they must do so.

Even if Enbridge could properly be considered a utility, it would still need to file an Act 16 application. The plain language in Rule 447(1)(c) would still require Enbridge to file an application if it "wants to construct facilities to transport crude oil or petroleum." Plus, a large piece of Enbridge's argument is that Rule 447(1)—interpreted in the context of Rule 447(2)—only applies to future utility service. But the Commission, in addition to holding that Enbridge did not provide utility service, also agreed 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." This is true. A service "to be furnished" can refer to a service currently being provided *if* the same service will continue to be furnished in the future, as in this case.

In fact, if Enbridge is a utility, it would likely have to provide more information in its Act 16 application than it would if it is not. Specifically, if Enbridge is not a utility, then it arguably does not have to comply with Rule 447(2)(c) and (f) that request the following information specific to utilities:

> (2) 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.
>
> * * *
>
> (f) The names of all utilities rendering the same type of service with which the proposed new construction or extension is likely to compete.

If, however, Enbridge is a utility, then it must supply the information described in these subsections relevant to utilities. Either way, Enbridge's status as a utility or non-utility under Rule 447(2) determines only what must be included in the application. By contrast, Enbridge's obligation to file an application arises from Rule 447(1) and is determined by the plain language in that section.

B. **Enbridge's proposed project is new construction.**

Enbridge argues that when Rule 447(1) refers to an oil pipeline company that "wants to ***construct*** facilities to transport crude oil or petroleum," Mich Admin

Code R 792.10447(1)(c) (emphasis added), the term "construction" should be understood to mean "new construction or extension" since that more specific term is used in Rule 447(2)(e) and (f). (Enbridge' Petition, pp 10–11.) Enbridge argues that an application is not required under Rule 447(1) for work performed to maintain or replace an existing pipeline or facility but only for work that qualifies as new construction or an extension of existing infrastructure to provide a new service. (Enbridge's Petition, p 9.) But, as explained above, the plain language of Rule 447(1)(c) does not require this interpretation.

Enbridge's argument misses the mark for a more fundamental reason as well. It does not matter whether the term "construction" is defined as "new construction" because Enbridge's proposed project is "new construction." The Commission noted that "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." (6/30/2020 Order, p 62.) Given this significant change to the pipeline's features and route, the Commission found that the project "is not simple maintenance or equivalent replacement of an existing pipeline" but is new construction under Rule 447(2)(e). (*Id.*)

The Commission properly focused on two factors when considering whether Enbridge's proposed pipeline is new construction: "(1) a change in pipe diameter (i.e., capacity) and (2) a relocation of the pipeline." (6/30/2020 Order, p 63.) Several Commission orders support these two factors.

One case the Commission cited was Case No. U-17020, which was an example of a replacement project that required an Act 16 application because the project increased capacity and fell outside the existing right-of-way. In that case, Enbridge proposed to, among other things, replace segments of Line 6B—a crude oil and petroleum pipeline—in need of repair and to "increase[e] the capacity of the pipeline." *In re Line 6B*, MPSC Case No. U-17020, 1/31/2013 Order, p 23. Enbridge also sought to deviate from the existing right-of-way in places to accommodate "some landowner requests, encroachments, land use, and construction issues." *Id.* at 12. Given the increased capacity and deviation from the existing rights-of-way—both of the Commission's factors—the replacement project could not be considered mere maintenance. Act 16 approval was needed. Case Nos. U-15251 and U-18166 are two other cases the Commission cited as examples of oil or natural gas projects that required applications because they met the Commission's two factors.

Case No. U-12334 is one case that the Commission did not cite as an example, but it is another example of a replacement project that required an Act 16 application. It is a good example because an application was apparently warranted in the case *solely* because of proposed changes to the pipeline's capacity and physical attributes. The Wolverine Pipe Line Company filed an application under Act 16 seeking "authority to construct, operate, and maintain a 12- and 16-inch outer diameter (O.D.) liquid petroleum products pipeline system in Jackson, Ingham, and Clinton counties." *Wolverine Pipe Line Co*, 3/7/2001 Order, p 1. It claimed that its proposal would allow it to meet current and future demand in the area "by

effectively replacing the [existing] 8-inch pipeline with a line having twice the capacity." *Id.* at 5. Notably, Wolverine said that the "pipeline facilities will be constructed either in or directly adjacent to existing utility easements," so their "construction and operation should cause a minimum of inconvenience." *Id.* at 16.

Wolverine's application was not driven by the need to obtain new easements or exercise eminent domain. This suggests that both factors described above do not need to be present to merit filing an Act 16 application; one factor may be enough in certain circumstances. Regardless, as previously mentioned, both factors should be considered to help distinguish between new construction and maintenance when deciding whether a new Act 16 application is needed for a replacement project. As the Commission held, (6/30/2020 Order, p 66), the words "construct," "constructed," and "maintain" in Act 16 and the Commission's rules should be understood as they are ordinarily used. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159 (2000) (words should be given "their common and ordinary meaning."). A common understanding of the word "construction" does not extend to mere maintenance.

The Commission explained that the ordinary meaning of "construct" is "to make or form by combining or arranging parts or elements: build." MERRIAM-WEBSTER ONLINE DICTIONARY (last visited August 17, 2020). Maintenance on a pipeline, like replacing its coating, is not construction because it does not "make or form" anything. Rather, maintenance repairs what has already been built or provides in-kind replacement. As Merriam-Webster defines "maintain," it is "to

keep in an existing state (as of repair, efficiency, or validity)." MERRIAM-WEBSTER ONLINE DICTIONARY (last visited August 17, 2020).

Enbridge did not address the two factors that the Commission considered when deciding whether a proposed project qualifies as new construction. Nor did Enbridge explore the definitions that the Commission relied on in determining that Enbridge's proposed project is new construction. Enbridge cannot rightfully dispute the Commission's holding that its proposed replacement and relocation project is new construction without challenging the fundamental precepts underlying its holding. Instead, Enbridge makes several arguments that tie into the arguments Staff already addressed above and that the Commission addressed in its order:

- Enbridge relies on the "to be furnished" language in Rule 447(2)(c), which Staff addressed above, to argue that an application is needed only if new utility service is being provided.

- Enbridge relies on the "new construction" language in Rule 447(2)(e) and (f) to argue that an application is needed only for new construction. The Commission addressed this in its order by finding that Enbridge's proposed project is new construction.

- Finally, Enbridge relies on the language in Rule 447(2)(f) and 447(3) that require an applicant to disclose the names of its competitors and gives these competitors an automatic right to participate. But this language is only relevant if Enbridge is a utility and, even then, does not undermine the Commission's holding that Enbridge's project is new construction.

Besides these arguments relating to Rule 447, Enbridge also argues that Act 16 itself does not require Enbridge to file an application for approval of its replacement and relocation project. According to Enbridge, "Section 6 of Act 16 only requires that a pipeline operator file 'an explicit authorized acceptance of the provisions of this act' and 'a plat.' " (Enbridge's Petition for Rehearing, p 12.) The

Commission rejected the same argument in Case No. U-12234. In that case, the Wolverine Pipe Line Company noted that it had filed " 'an explicit authorized acceptance of Act 16' and 'a map showing the location of the pipeline and appurtenances,' " and it argued that this was "all that is required pursuant to Act 16." *In re Wolverine Pipe Line Co*, MPSC Case No. U-12234, 3/7/2001 Order, p 11 (describing Wolverine's arguments). The Commission rejected these arguments and agreed with Staff that Wolverine's interpretation would require the Commission to " 'rubber stamp' every request to build a liquid petroleum products pipeline — regardless of safety, need, and public inconvenience — so long as the corresponding application is properly completed." *Id*. at 11–12.

In any case, pipeline operators have been filing Act 16 applications since before Rule 447 was promulgated. And as Enbridge repeatedly notes, its predecessor in interest, Lakehead Pipeline Company, filed an Act 16 application with the Commission in 1953, which the Commission granted after a contested hearing. *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 29, 41 (1954). On appeal, the Supreme Court held that Lakehead had "complied in all respects with the procedure specified by P.A.1929, No. 16." *Id*. at 41. There can be no serious dispute that Act 16 allows the Commission to require an application when the Supreme Court acknowledged this practice almost 70 years ago, and the Commission has required applications to be filed ever since.

C. Enbridge's recycled arguments are not a basis on which to grant a petition for rehearing.

Most of Staff's response has focused on the substance of Enbridge's Petition for Rehearing, but there are also procedural grounds on which to reject its Petition. Enbridge repeats several arguments that it raised in its request for a declaratory ruling and in its comments and reply comments supporting its request. Indeed, Enbridge's claim of error is largely grounded in arguments the Commission already rejected. (Compare Enbridge's 5/13/2020 Comments in Support of its Request for Declaratory Relief, pp 13–17, with Enbridge's Petition for Rehearing, pp 7–11.)

Enbridge's last argument in its Petition for Rehearing is another example of its repeat arguments. Enbridge argues that the Commission's 1953 order provides authority to construct and maintain Line 5 without any additional approval for the project. (Enbridge's Petition for Rehearing, pp 12–15.) This argument reconstitutes Enbridge's earlier argument that the 1953 order provides Enbridge the right to construct, operate, and maintain Line 5 without new Act 16 authorization. (Enbridge's 5/13/2020 Comments, pp 11–13.)

Despite procedural grounds to reject Enbridge's Petition, Staff urges the Commission not to reject it on procedural grounds alone but to also reject it on the substantive grounds identified above.

IV. **Conclusion and Relief Requested**

The Commission correctly concluded that Enbridge is not a public utility but that it nonetheless needs to file an application, under Rule 447(1)(c) of the Commission's Rules of Practice and Procedure, for Act 16 approval of its proposed replacement and relocation project in the Straits of Mackinac. Rule 447(1)(c) requires Enbridge to file an application as an oil pipeline company that "wants to construct facilities to transport crude oil or petroleum." Mich Admin Code, R 792.10447(1)(c). While Rule 447(1)(c) does not limit applications to new construction, the Commission nonetheless found that Enbridge's proposed project is new construction based on two factors that Enbridge has not disputed.

Despite Enbridge's arguments that it is public utility and that Rule 447(2)'s content requirements for utility applications somehow free it from Rule 447(1)'s filing requirements, Rule 447(1) plainly requires Enbridge to file an application. No amount of statutory construction can overcome this plain language. And despite Enbridge's arguments that its proposed $500 million replacement and relocation project is mere maintenance, a common-sense understanding of the difference between "construction" and "maintenance" supports the Commission's holding that Enbridge's proposal is construction and not maintenance.

Although there are also procedural grounds to deny Enbridge's Petition for Rehearing, Staff respectfully requests that the Commission deny the application on the substantive grounds described above, as well as on procedural grounds.

Respectfully submitted,

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Dated: August 19, 2020

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF EATON)

Cherie A. Richie, being first duly sworn, deposes and says that on **August 19, 2020,** she served a true copy of **Michigan Public Service Commission Staff's Response Opposing Enbridge Energy, LP's Petition for Rehearing** upon the following parties **via email only**:

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Cherie Richie

Subscribed and sworn to before me
This **19th** day of **August, 2020**.

Pamela A. Pung

Pamela A. Pung, Notary Public
State of Michigan, County of Clinton
Acting in the County of Eaton
My Commission Expires: 5-7-2025