

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 December 9, 2020 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Sally A. Talberg, 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 Public Act 16 of 1929, MCL 483.1 *et seq.* (Act 16) and the Commission’s Rules of Practice and Procedure, Mich Admin Code, R 792.10447, 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). Enbridge sought *ex parte* approval of the application. In the alternative, Enbridge requested 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.

On April 22, 2020, the Commission issued an order in this case seeking comments on the threshold issue presented in the declaratory relief request. The Commission also decided to hold Enbridge's application in abeyance while it considered the request for a declaratory ruling.

On June 30, 2020, the Commission issued an order in this case denying both *ex parte* approval of the application and the requested declaratory relief (June 30 order). The Commission set this matter for a contested proceeding, and invited the continued submission of comments.

On August 12, 2020, a prehearing conference was held before Administrative Law Judge Dennis W. Mack (ALJ), at which intervention was granted to the Michigan Department of the Attorney General (Attorney General); For Love of Water (FLOW); the Michigan Environmental Council (MEC), Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, and National Wildlife Federation (together, the MEC Coalition); Bay Mills Indian Community (Bay Mills); Environmental Law & Policy Center (ELPC) and Michigan Climate Action Network (MiCAN) (together, ELPC/MiCAN); Little Traverse Bay Bands of Odawa Indians; Nottawaseppi Huron Band of the Potawatomi; Michigan Laborers' District Council; Michigan Propane Gas Association and the National Propane Gas Association (together, the Associations); and the Mackinac Straits Corridor Authority (MSCA). The Commission Staff (Staff) also participated. On August 13, 2020, the ALJ adopted a schedule for the case.

On September 2, 2020, Enbridge filed a motion in limine. On September 23, 2020, responses to the motion were filed by the Staff, ELPC/MiCAN and Bay Mills, FLOW, the Attorney General, the Associations, and the MEC Coalition. On September 30, 2020, the ALJ held a hearing on the motion.

On October 23, 2020, the ALJ issued a ruling granting the motion in part, and denying it in part (the ruling). On November 6, 2020, Bay Mills, the MEC Coalition, ELPC/MiCAN, FLOW, and the Attorney General filed applications for leave to appeal the ruling under Mich Admin Code, R 792.10433. On November 20, 2020, Enbridge, the Associations, the Staff, and MSCA filed responses to the applications for leave to appeal.

Background

In its application, Enbridge explains that Line 5 was constructed in 1953 and is a 645-mile interstate pipeline that traverses Michigan's Upper and Lower peninsulas, originating in Superior, Wisconsin, and terminating near Sarnia, Ontario, Canada. Application, p. 5. Enbridge states that Line 5 was built to transport light crude oils and natural gas liquids. Enbridge states 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 (the tunnel). Application, pp. 2, 8. Enbridge asserts that, because the pipeline will be located in a tunnel deep beneath the lakebed, the aquatic environment will be protected from any release of liquid petroleum caused by a vessel anchor strike or some other event. The construction of the tunnel is the subject of separate applications before other state and federal agencies.

Enbridge states that it entered into a series of agreements with the State of Michigan relating to the relocation of the Line 5 pipe segment within the tunnel. Enbridge notes that the Michigan Legislature enacted Public Act 359 of 2018 (Act 359), which created the MSCA and delegated to the MSCA authority to enter into agreements pertaining to the construction, operation, and maintenance of the tunnel to house the replacement pipe segment. 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 (DNR) to the MSCA, and pursuant to the assignment of certain rights under that easement by the MSCA to Enbridge. Enbridge seeks Commission approval to operate and maintain the replacement pipe segment located within the tunnel as part of Line 5 under Act 16. Enbridge states that once the pipe segment is placed into service within the tunnel, service on the dual pipelines will be discontinued. *Id.*, p. 3. Enbridge explains that the discontinuation will occur pursuant to certain agreements between Enbridge and the State of Michigan, “and the 1953 Easement that is administered by the [DNR], which authorizes the Dual Pipelines to be located within the Straits” (1953 easement). *Id.*

On November 13, 2020, Governor Gretchen Whitmer and the DNR revoked and terminated the 1953 easement and directed Enbridge to cease operations of the dual pipelines no later than 180 days from the date of the termination notice, or approximately May 13, 2021.¹ The Notice of Revocation and Termination of Easement, p. 1, states:

[T]he State of Michigan hereby provides formal notice to Enbridge . . . that the State is revoking and terminating the 1953 Easement . . . The revocation and termination each take legal effect 180 days after the date of this Notice to provide notice to affected parties and to allow for an orderly transition to ensure Michigan’s energy needs are met. Enbridge must cease operation of the Straits Pipelines 180 days after the date of this Notice.

Also on November 13, 2020, the Attorney General filed an action in the Ingham County Circuit Court on behalf of the State of Michigan, Governor Whitmer, and the DNR, seeking declaratory and injunctive relief to acknowledge and enforce the revocation (Case No. 20-646-CE). On

¹ *See*,

https://content.govdelivery.com/attachments/MIEOG/2020/11/13/file_attachments/1600920/Notice%20of%20%20Revocation%20and%20Termination%20of%20%20Easement%20%2811.13.20%29.pdf (Notice of Revocation and Termination of Easement) (accessed November 29, 2020).

November 24, 2020, Enbridge filed an action against the State of Michigan in the U.S. District Court for the Western District of Michigan for declaratory and injunctive relief seeking a determination that the revocation is not lawful (Case No. 20-CV-01141).

Remand Determination

In the June 30 order, the Commission stated:

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.

June 30 order, p. 70. The Commission concludes that the revocation and termination of the 1953 easement is just such a significant development, and remands the motion in limine to the ALJ for rehearing. MCL 24.287(1). As stated above, the Commission looks to the ALJ and the parties to make appropriate adjustments to the current schedule to allow the parties to file new responses to the motion in limine in light of the revocation, and to adjust the schedule to allow for a ruling on the remanded motion prior to the date on which the Staff and the intervenors must file their testimony. The Commission recognizes that this is likely to affect other dates including the dates for rebuttal testimony, cross-examination, and briefing.

Clarity with respect to its scope is fundamental to this proceeding, and the Commission notes that the ALJ's ruling, along with the motion and the responses to the motion, were premised on the continued existence of the 1953 easement and the continued operation of the dual pipelines under that easement. With the State of Michigan's revocation and termination of the 1953 easement, the facts have changed. The Commission is concerned that such a fundamental change may

significantly affect the arguments that the parties would have made in support of, and in opposition to, the motion.²

The Commission also notes that the revocation occurred subsequent to the filing of the applications for leave to appeal but before the date for the filing of responses to the applications. Thus, the four responding parties were able to address the occurrence of the revocation, but the applicants for leave to appeal were not. Additionally, no party was able to address the fact of the revocation in the responses to the motion or the oral argument. The Commission wishes to give the parties the opportunity to brief the question of whether, and, if so, to what extent Governor Whitmer's action to revoke and terminate the 1953 easement changes the scope of review in this proceeding and how that change, if any, effects the issues presented in the motion in limine, including the issues of public need for the Line 5 Project and the required environmental review of the Line 5 Project.

THEREFORE, IT IS ORDERED that:

A. Enbridge Energy, Limited Partnership's motion in limine is remanded to the Administrative Law Judge for rehearing and reconsideration.

B. The Administrative Law Judge shall set a revised schedule for this matter that allows the parties to file new responses to Enbridge Energy, Limited Partnership's motion in limine, and that extends the schedule to accommodate the additional time required for this rehearing and reconsideration.

² For example, in response to the applications for leave to appeal, Enbridge argues that Line 5 will continue in operation in the Straits indefinitely, whether or not the Line 5 Project is approved, based on demand. Enbridge's Response to Applications for Leave to Appeal, p. 9.

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 and to the Michigan Department of the Attorney General - Public Service Division at 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

Daniel C. Scripps, Chair

Sally A. Talberg, Commissioner

Tremaine L. Phillips, Commissioner

By its action of December 9, 2020.

Lisa Felice, Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

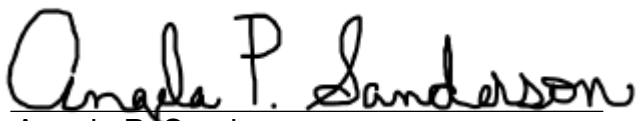
Case No. U-20763

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on December 9, 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 9th day of December 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

Name	Email Address
Abigail Hawley	abbie@envlaw.com
Adam J. Ratchenski	aratchenski@earthjustice.org
Amy L. Wesaw	amy.wesaw@nhbp-nsn.gov
Benjamin J. Holwerda	holwerdab@michigan.gov
Christopher M. Bzdok	chris@envlaw.com
Christopher M. Bzdok	chris@envlaw.com
Christopher M. Bzdok	chris@envlaw.com
Christopher M. Bzdok	chris@envlaw.com
Christopher M. Bzdok	chris@envlaw.com
Christopher P. Legghio	cpl@legghioisreal.com
Christopher R. Clark	cclark@earthjustice.org
Courtney A. Kachur	ckachur@saulttribe.net
Daniel P. Ettinger	dettinger@wnj.com
Daniel P. Ettinger	dettinger@wnj.com
David L. Gover	dgover@narf.org
Deborah Musiker	dchizewer@earthjustice.org
Dennis Mack	mackd2@michigan.gov
Enbridge Energy, Limited Partnership	gregg.johnson@enbridge.com
Esosa R. Aimufua	eaimufua@elpc.org
Esosa R. Aimufua	eaimufua@elpc.org
Howard A. Learner	hlearner@elpc.org
Howard A. Learner	hlearner@elpc.org
James A. Bransky	jbransky@chartermi.net
James M. Olson	jim@flowforwater.org
Jeffrey S. Rasmussen	jasmussen@nativelawgroup.com
Jennifer U. Heston	jheston@fraserlawfirm.com
Jeremy J. Patterson	jpatterson@nativelawgroup.com
John S. Swimmer	john.swimmer@nhbp-nsn.gov
Johnathan R. Loera	jloera@nativelawgroup.com
Kathryn L. Tierney	candyt@bmic.net
Kiana E. Courtney	kcourtney@elpc.org
Kiana E. Courtney	kcourtney@elpc.org
Lauren E. Crummel	crummel@legghioisreal.com
Leah J. Brooks	brooksl6@mi.gov
Lydia Barbash-Riley	lydia@envlaw.com
Lydia Barbash-Riley	lydia@envlaw.com
Lydia Barbash-Riley	lydia@envlaw.com
Margaret C. Stalker	mstalker@wnj.com
Margaret C. Stalker	mstalker@wnj.com
Margrethe Kearney	mkearney@elpc.org
Margrethe Kearney	mkearney@elpc.org

Mary K. Rock
Matthew L. Campbell
Megan R. Condon
Michael S. Ashton
Nicholas Q. Taylor
Paul D. Bratt
Paul D. Bratt
Robert P. Reichel
Shaina Reed
Spencer A. Sattler
Stuart M. Israel
Troy M. Cumings
Troy M. Cumings
Whitney B. Gravelle
William Rastetter

mrock@earthjustice.org
mcampbell@narf.org
mcondon@narf.org
mashton@fraserlawfirm.com
taylorn10@michigan.gov
pbratt@wnj.com
pbratt@wnj.com
reichelb@michigan.gov
sreed@fraserlawfirm.com
sattlers@michigan.gov
israel@legghioisrael.com
tcumings@wnj.com
tcumings@wnj.com
wgravelle@baymills.org
bill@envlaw.com