STATE OF MICHIGAN

IN THE COURT OF APPEALS

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE & RELOCATE LINE 5

BAY MILLS INDIAN COMMUNITY, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI,

Appellants,

v.

MICHIGAN PUBLIC SERVICE COMISSION,

Appellee.

Court of Appeals Nos. 369156, 369159, 369161, 369162 (consolidated)

MPSC Case No. U-20763

BRIEF OF APPELLANTS BAY MILLS INDIAN COMMUNITY, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, AND NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

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JURISDICTIONAL STATEMENT

On December 1, 2023, the Michigan Public Service Commission ("PSC" or "Commission") issued an Order in Case No. U-20763 granting the application of Enbridge Energy, Limited Partnership ("Enbridge") pursuant to 1929 PA 16, MCL 483.1 *et seq*., ("Act 16") and Rule 447 of the Commission's Rules of Practice and Procedure. On December 22, 2023, Bay Mills Indian Community ("Bay Mills") filed a Claim of Appeal in this proceeding. By an order dated January 8, 2024, this Court consolidated this appeal with those filed by the Little Traverse Bay Bands of Odawa Indians ("LTBB"), the Grand Traverse Band of Ottawa and Chippewa Indians ("GTB"), the Nottawaseppi Huron Band of the Potawatomi ("NHBP"), Michigan Environmental Council ("MEC"), Tip of the Mitt Watershed Council ("TOMWC"), National Wildlife Federation ("NWF"), For Love of Water ("FLOW"), Environmental Law & Policy Center ("ELPC"), and Michigan Climate Action Network ("MiCAN"). By an order on February 12, 2024, this Court consolidated the appeal of Matthew S. Borke with those that were previously consolidated on January 8.

The Court of Appeals has jurisdiction in this appeal under Const 1963, art 6, § 28; the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.301 to MCL 24.306; MCL 462.26; MCL 460.59; MCR 7.203(A)(2); and MCR 7.02(6)(a)(i). Bay Mills, LTBB, GTB and NHBP (collectively, the "Tribal Intervenors") filed their Claims of Appeal within 30 days of the Commission's Order, as provided for by statute.

STATEMENT OF QUESTIONS INVOLVED

1. Did the Commission err when it barred the Intervening Parties from submitting evidence about "the public need for and continued operation of Line 5" in response to a motion filed by Enbridge Energy, Limited Partnership ("Enbridge") and then made factual findings in its final order, dated December 1, 2023, about the public need for and continued operation of Line 5?

The Commission answered "No."

Tribal Intervenors answer "Yes."

2. Did the Commission fail to satisfy its obligations under the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701, *et seq.*, by granting Enbridge's motion to exclude evidence about risks of, and likely pollution from, oil spills from Line 5?

The Commission answered "No."

Tribal Intervenors answer "Yes."

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

MCL 483.1(2) (Relevant section of Crude Oil and Petroleum Act, Public Act 16 of 1929):

> (2) A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation or otherwise, 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, or carbon dioxide substances, or engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state, 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, or used in connection with that business on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within this state, or have or possess the right of eminent domain, or any other right, concerning the business or operations, in whole or in part, except as authorized by and subject to this act.

MCL 483.3(1) (Relevant section of Crude Oil and Petroleum Act, Public Act 16 of 1929):

> (1) Subject to subsection (2), the commission is granted the power to control, investigate, and regulate a person doing any of the following:
>
> > (a) Exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation, or otherwise within this state.
> >
> > (b) 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, or carbon dioxide substances within this state.
> >
> > (c) Engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state.

MCL 483.8 (Relevant section of Crude Oil and Petroleum Act, Public Act 16 of 1929):

> The commission is hereby authorized and empowered to make all rules, regulations, and orders, necessary to give effect to and enforce the provisions of this act.

MPSC Rule 447, Mich Admin Code, R 792.10447(1)(c):

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

(c) A corporation, association, or person conducting oil pipeline operations within the meaning of 1929 PA 16, MCL 483.1 to 483.11, 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.

MCL 324.1705 (Michigan Environmental Protection Act):

(1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, waters, or other natural resources of the public trust in these resources.

(2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

MCL 24.272(3) and (4) (Administrative Procedures Act):

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

INTRODUCTION

The Straits of Mackinac represents the center of the Anishinaabe creation story and is a place of ongoing cultural, spiritual, and economic significance to Appellants and other Tribal Nations in Michigan. The area is replete with cultural and historical sites. As a result of an 1836 treaty with the United States, Tribal Nations retain property rights to natural resources in territory ceded to the United States, including in and around the Straits of Mackinac. These property rights include, *inter alia*, the right to hunt, fish, and gather. Appellants intervened in the contested case proceeding that is the subject of this appeal to protect this sacred area and the resources within it.

On December 1, 2023, the Michigan Public Service Commission approved Enbridge's application to construct a massive tunnel under the lakebed of the Straits of Mackinac to house a new segment of the Line 5 pipeline. The new pipeline would have the effect of sustaining and extending Michigan's use of, and reliance on, Line 5 and the fossil fuel products it transports for decades to come.

During the early stages of the contested case, the Commission barred the intervening parties from introducing evidence relevant to its final decision. It excluded evidence about the public need to preserve and extend the use of Line 5 through construction of a tunnel. The Commission also barred evidence related to the risks of oil spills, leaks and discharges that would persist as a result of the project's approval. In essence, the Commission approved a massive fossil fuel infrastructure project that will perpetuate the use of and reliance on Line 5 without allowing the parties to develop a full record about (1) whether the State needs the pipeline, and (2) how the extended use of the pipeline has harmed—and will continue to harm—the natural treaty-protected resources in the State.

Appellants—and, indeed, all Michiganders—deserve better than the incomplete and inconsistent consideration the Commission gave to Enbridge's proposal. Evidence about the public need for the pipeline is directly relevant to the Commission's consideration of Enbridge's application under Act 16. Evidence about the history of oil spills—and the project's perpetuation of oil spill risks in the future—is directly relevant to the Commission's required analysis of the likely harms associated with approving the project pursuant to the Michigan Environmental Protection Act ("MEPA").

In summary, the Commission erred in interpreting its obligations under Act 16 and MEPA, resulting in a decision to unlawfully limit the scope of the case. By excluding entire categories of evidence from its inquiry, the Commission violated the parties' rights under the Administrative Procedures Act ("APA") and the Michigan Rules of Evidence. The decision should be reversed and remanded.

STATEMENT OF FACTS

A. Enbridge Seeks Approval to Construct a Tunnel Under the Straits of Mackinac.

Enbridge filed its 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 on April 17, 2020 ("Application"). (Doc No. 20763-0001) (TI Appendix M). In its Application, Enbridge sought approval to replace the segment of the Line 5 pipeline ("Line 5") that crosses the Straits of Mackinac, which consists of two 20-inch-wide pipelines (the "Dual Pipelines"), with a new single pipeline to be routed under the lakebed of the Straits of Mackinac. The Application stated that the purpose of the proposed tunnel 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." *Id*. at 1 (TI Appendix M at 694).

Line 5 was constructed in 1953, prior to the enactment of virtually all state and federal environmental laws, and without consultation with the Tribal Nations whose treaty-protected territory the pipeline traverses and threatens. It runs from Superior, Wisconsin to Sarnia, Ontario, crossing hundreds of interconnected waters along its path. *Id*. at 5 (TI Appendix M at 698). It transports about 486,000 barrels per day of light crude oil or natural gas liquids (NGLs). See Samuel Direct Testimony, 7 Tr 757 (stating that, for the past 10 years, Line 5 has operated at about 90% of its annual average capacity of 540,000 barrels per day). Where it crosses the Great Lakes in the Straits of Mackinac, Line 5 splits into the Dual Pipelines that are located on the lakebed or, in many places, suspended in the water. Since their construction, the Dual Pipelines have been struck by anchors of passing vessels and subjected to the wear and tear that comes with 70 years of operation and exposure to the elements. See Notice of Revocation & Termination of Easement, Exhibit ELP-18, pp 5-7 (Doc No. U-20763-1046) (TI Appendix N at 717-19).

The Application further described the proposed project as a 4-mile-long tunnel through the lakebed of the Straits that would house a new 30-inch-diameter crude oil and natural gas liquids pipeline. Application, p 8 (TI Appendix M at 701). Based on the volatility of crude oil and propane, Enbridge's proposal to situate the pipeline in an enclosed tunnel is "atypical" and, as testified to by a pipeline safety expert, creates significant safety concerns. Kuprewicz Rebuttal Testimony, 10 Tr 1327-1330 (TI Appendix G at 642-45). Enbridge proposed that the new pipeline would then be connected to other segments of Line 5 on each side of the Straits of Mackinac, to continue the flow of oil through Line 5 for another century.

As part of its Application, Enbridge requested a declaratory ruling that its application did not need to proceed through the Commission's approval process because, according to Enbridge, it already had the requisite authority for the project based on the Commission's grant of authority for the construction of the Line 5 pipeline in 1953. Application, p 15 (TI Appendix M at 708).

Following the submission of Enbridge's Application, the Tribal Intervenors filed Petitions to Intervene, with supporting affidavits, in unanimous opposition to the proposed project. See Bay Mills Petition to Intervene (Doc No. U-20763-0059), GTB Petition to Intervene (Doc No. U-20763-0110), LTBB Petition to Intervene (Doc No. U-20763-0165), NHBP Petition to Intervene (Doc No. U-20763-0167). The Straits is the center of the Ojibwe creation story and a place of great spiritual, cultural, and economic significance for Tribal Nations. See Revised Direct Testimony of Pres. Whitney Gravelle, 10 Tr 1417 (Doc. No. U-20763-1049) (TI Appendix H at 650). The Tribal Intervenors expressed their strong interests in protecting their traditional lifeway, including their treaty-protected right to hunt, fish, and gather, from harm caused by Enbridge's proposed project. As described in Bay Mills' Petition:

> The operation of current Line 5, and the prospect of the siting and construction of a tunnel in the Straits of Mackinac for the transport of petroleum products, is the most obvious and most preventable risk to the fishery resources throughout northern Lakes Michigan and Huron. [Affidavit of Pres. Bryan Newland, Bay Mills' Petition to Intervene, p 4 para 11 (Doc No. 20763-0059) (TI Appendix O at 750).]

Three of the four Tribal Intervenors—Bay Mills, GTB and LTBB—have interests in the Great Lakes and Straits of Mackinac that are protected by a treaty with the United States. Threatened with removal from their homeland, the Ottawa (alternatively "Odawa") and Chippewa concluded a treaty on March 28, 1836 (the "1836 Treaty") in which they transferred to the United States almost half of the land and water that would become the State of Michigan:

about 14 million acres of land and inland waters and 13 million acres in Lakes Michigan, Huron, and Superior. Treaty of 1836, 7 Stat 491; see also Bay Mills Petition to Intervene, pp 1-2 (Doc No. 20763-0059).[1] In ceding the lands and waters, the Tribal Nations reserved the rights to hunt, fish, and gather throughout the ceded territory. 7 Stat 491. These rights have been confirmed by state and federal courts. See *People v LeBlanc*, 399 Mich 31; 248 NW2d 199 (1976); *United States v Michigan*, 471 F Supp 192 (WD Mich, 1979), aff'd 653 F2d 277 (CA 6, 1981), cert denied 454 US 1124 (1981); *Grand Traverse Band of Chippewa & Ottawa Indians v Dir, Mich Dep't of Nat Res*, 971 F Supp 282, 288-89 (WD Mich, 1995), aff'd 141 F3d 635 (CA 6, 1998).

On June 30, 2020, the Commission denied the declaratory relief requested by Enbridge and ordered that this matter proceed as a contested case. Order (Doc. No. 20763-0133). On August 13, 2020, the ALJ granted the petitions to intervene of the Tribal Intervenors and other parties, and set a schedule for the contested case proceedings See Scheduling Memo (Doc No. 20763-0222).

B. Statutory Provisions Governing the Contested Case.

In its June 30, 2020 Order (Doc No. 20763-0133), the Commission noted that Act 16 regulates "the business of carrying or transporting, buying, selling, or dealing in crude oil or petroleum or its product" by providing "for the control and regulation of all corporations, associations, and persons engaged in such business, by the Michigan public service commission . . . ." Order, p 59, quoting MCL 483. A person or company may not transport crude oil or petroleum products through pipelines in Michigan except as authorized by and subject to Act 16. MCL 483.1(2).

Act 16 provides the Commission with "broad jurisdiction" over the construction, maintenance, operation, and routing of pipelines delivering liquid petroleum products. *In re Wolverine Pipe Line Co*, PSC Case No. U-13225, Order of July 23, 2002, p 4 (TI Appendix P at

[1] Bay Mills, GTB, and LTBB (as well as Sault Ste. Marie Tribe of Chippewa Indians and Little River Band of Ottawa Indiana) are successors to the signatories of the 1836 Treaty and are collectively known as "the 1836 Treaty Tribes." Although NHBP is not one of the 1836 Treaty Tribes, NHBP and its members consistently maintain their culture and way of life through many of the same natural resources. NHBP Petition to Intervene, p 1 (Doc No. 20763-0167).

755)[2]; MCL 483.1(2). Pursuant to MCL 483.8, the Commission has authority to make rules, regulations, and orders to effectuate and enforce the provisions of Act 16. As a result, the Commission promulgated Rule 447, which requires a corporation, association, or person seeking to construct facilities to transport crude oil or petroleum products to file an application with the Commission to receive the necessary approval. Mich Admin Code, R 792.10447(1)(c).

Generally, a petroleum pipeline project must satisfy three criteria to be eligible for the Commission's approval under Act 16: (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. *In re Wolverine Pipe Line Co*, PSC Case No. U-13225, Order of July 23, 2002, pp 4-5 (TI Appendix P at 755-56). The applicant bears the burden of proving these factors by the preponderance of the evidence. See *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 89; 367 NW2d 1 (1985); *Aquilina v General Motors Corp*, 403 Mich 206, 210; 267 NW2d 923 (1978).

In addition to Act 16, the Commission has an obligation to apply the requirements of MEPA to its decisions. *Michigan State Hwy Comm v Vanderkloot*, 392 Mich 159, 189-190; 220 NW2d 416 (1974). Pursuant to Section 5(2) of MEPA, MCL 324.1705(2), in an administrative permitting proceeding, an agency must determine whether the proposal under review is likely to pollute, impair, or destroy natural resources, or the public trust in those resources. If the proposal is likely to pollute, impair, or destroy natural resources, the proposal cannot be approved if a "feasible and prudent alternative" exists. *Id*.

C. The ALJ Grants and the Commission Upholds, in Part, Enbridge's Motion In Limine.

At the beginning of the contested case, before the parties had the opportunity to conduct discovery and develop evidence, Enbridge filed a motion in limine (the "Motion In Limine") to exclude six categories of evidence and issues that it argued were "legally irrelevant." Motion In Limine, pp 1-2 (Doc No. 20763-0296). The six categories were: (1) the construction of the tunnel, (2) the environmental impact of the tunnel construction, (3) the public need for and

[2] The Commission has issued rulings describing its authority under Act 16 and the criteria it uses to evaluate applications under that authority. The *Wolverine* case describes the legal framework that the Commission employed in this case.

continued operation of Line 5, (4) the current operational safety of Line 5, (5) climate change, and (6) the intervenors' "climate change agendas."[3] *Id.*

In the Motion In Limine, Enbridge argued that evidence about the public need for and continued operation of Line 5 was "outside the scope" of the contested case because the public need for the pipeline had been established by order of the Commission in 1953—seventy-one years ago—and that there is "no statutory basis in Act 16 … to interfere with the current operation of Line 5 or to rescind or revoke a prior approval for a pipeline." *Id*. at 13-14.

The following intervening parties filed briefs opposing the motion: Bay Mills, MEC, GTB, TOMWC, NWF, ELPC, MiCAN, FLOW and, notably, the Michigan Attorney General, Dana Nessel. (Doc Nos. 20763-0326, 20763-0329, 20763-0330, and 20763-0331.) The PSC Staff filed a brief supporting Enbridge's request to bar evidence related to issues of public need, operational safety, and climate, but opposing the request with respect to the remainder of the issues. (Doc No. 20763-0328). The Michigan Propane Gas Association and National Propane Gas Association filed a brief in support of the Motion In Limine. (Doc No. 20763-0332).

With respect to Enbridge's request to exclude evidence about "the public need for and continued operation of Line 5," the intervening parties opposing the motion argued, *inter alia*, that Enbridge had placed the issue of the public need for the pipeline front and center in its application materials through statements and evidence asserting that one of the purposes of the proposed tunnel was to extend the life of Line 5. Joint Response to Motion In Limine by MEC, GTB, Bay Mills, TOMWC & NWF, pp 26-28 (Doc No. 20763-0326). They also explained that the introduction of evidence in this proceeding about the public need for Line 5 would not interfere with the current operation of Line 5 and would not rescind or revoke a prior approval. *Id.* at 32-33. Regarding Enbridge's request to exclude evidence about "the current operational safety of Line 5" and the "continued operation of Line 5," the intervening parties explained that this evidence was relevant pursuant to MEPA because pollution risk from extending the operation of Line 5 for additional decades is a likely effect of constructing a tunnel. *Id*. at 33-34.

On October 23, 2020, the ALJ issued a ruling on the Motion In Limine. (Doc No. 20763-0396) (TI Appendix B). The ALJ denied the motion as it pertained to issues of tunnel construction and its environmental impact but granted the motion in all other respects. With

[3] Enbridge never defined what "climate change agenda" it believed the various intervening parties have.

respect to evidence about the public need for Line 5, the ALJ explained that the parties did have the right to submit evidence about the public need for the proposed tunnel project, but that "any evidence concerning the current and future operational aspects of the entirety of Line 5, including the public need and safety issues, is outside the scope of the case." *Id*. at 16 (TI Appendix B at 369).

On November 6, 2020, the parties who had opposed the Motion In Limine filed applications for leave to appeal pursuant to Rule 433 of the Commission's Administrative Hearing Rules. (Doc Nos. 20763-0419, 20763-0420, 20763-0421, 20763-0423). The Attorney General filed a brief indicating her support for, and joinder in, the four applications for leave to appeal. (Doc No. 20763-0422).

On November 13, 2020, while the applications for leave to appeal were pending, the State of Michigan notified Enbridge that it was in violation of its 1953 Easement for the Dual Pipelines, and that the Easement itself was void since its inception. Notice of Revocation & Termination of Easement, Exhibit ELP-18 (Doc No. U-20763-1046) (TI Appendix N). The Governor and the Michigan Department of Natural Resources found that Enbridge "breached or violated the standard of due care and its obligations to comply with the conditions of the Easement" (*id*. at 12; TI Appendix N at 724) by: (1)ignoring the requirement that each pipeline be physically supported at least every 75 feet "virtually the entire time the Easement has been in place" (*id*. at 13; TI Appendix N at 725); (2) failing to "inspect, timely repair, and disclose exceedances of pipe spans to the State of Michigan" (*id*. at 14; TI Appendix N at 726); (3) failing to timely investigate the condition of the pipeline coating/wrap despite its poor condition (*id*. at 15; TI Appendix N at 727); and, (4) ignoring exceedances of pipeline curvature standards (*id*. at 16; TI Appendix N at 728). The Notice of Revocation and Termination further noted that Enbridge "produced few contemporaneous records and little evidence that it conducted a pipeline inspection and maintenance program from 1953 to the late 1990s or early 2000s – i.e., during most of the Easement's existence." *Id*. at 2 n 1 (TI Appendix N at 714).

On December 9, 2020, the Commission issued an order remanding Enbridge's Motion In Limine to the ALJ for rehearing and reconsideration in light of the Notice of Revocation and Termination. (Doc No. 20763-0480).

After additional briefing from the parties, the ALJ issued his second decision on Enbridge's Motion In Limine on February 23, 2021. (Doc No. 20763-0602) (TI Appendix C).

The ALJ affirmed the decision he had made in his first ruling to exclude evidence related to the public need for the continued operation of Line 5:

> To be clear, these Parties [opposing the Motion In Limine] have the right to offer relevant evidence concerning the public need for the activity proposed in the Application. However, this issue raised in the Motion is the relevancy of the public need for Line 5, which was established in the 1953 Order. No matter how the context or purpose is framed, these Parties are seeking to litigate the issue to ultimately obtain a determination that a public need does not exist for Line 5. . . . [T]he 1953 Order that authorized Line 5 under Act 16, including the determination it serves a public need and public purpose, remains in effect. [*Id*. at 17 (TI Appendix C at 395).]

While the ALJ's ruling narrowly permitted evidence related to the Straits crossing, it completely barred the parties from introducing evidence for the public need for Line 5, determining as a matter of law, that such evidence was not necessary because the public need for Line 5 was established in 1953. On March 9, 2021, the parties opposing the Motion In Limine again filed petitions for leave to appeal. (Doc Nos. 20763-0620, 20763-0622, 20763-0624, and 20763-0625).

On April 21, 2021, the Commission issued its ruling on Enbridge's Motion In Limine. (Doc No. 20763-0713) (TI Appendix D). With respect to Enbridge's request to exclude evidence of the public need for and continued operation of Line 5, the Commission affirmed the ALJ's ruling and denied the relief requested by the Tribal Intervenors. *Id*. at 59-63 (TI Appendix D at 464-68). The Commission stated:

> In the instant case, the Commission finds that the first issue is whether there is a public need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. The public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined. [*Id*. at 63 (TI Appendix D at 468).]

The Commission reversed the ALJ's ruling with respect to climate change. It found that "the allegations of GHG [greenhouse gases] pollution made by several intervenors to this case fit within the statutory language of Section 5 of MEPA, and therefore must be reviewed in this case." *Id*. at 66 (TI Appendix D at 471). In reaching this conclusion, the Commission stated: "It defies both well accepted principles of statutory interpretation as well as common sense to apply MEPA to a pipeline *but not to the products being transported through it.*" *Id*. at 64 (TI Appendix D at 469) (emphasis added). The Commission further explained: "While the project under

consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review." *Id*. at 66-67 (TI Appendix D at 471-72).

But, despite these statements, the Commission upheld the exclusion of evidence related to the history of oil spills from Line 5 and the risk that such spills would continue in the future as a result of the tunnel, stating: "Issues raised by Bay Mills and other intervenors on potential pollution, impairment, and destruction of Michigan's natural resources resulting from existing sections of Line 5 are . . . outside the scope of the Commission's MEPA review . . . ." *Id*. at 64 (TI Appendix D at 469). The intervening parties had argued that such evidence was crucial in evaluating the environmental risks associated with the proposed tunnel because "Line 5 crosses over 290 rivers and streams—many of which the Tribes have treaty rights to, which are interconnected and, which flow to the Great Lakes." Joint Response to Motion In Limine by MEC, GTB, Bay Mills, TOMWC & NWF, p 29 (Doc No. 20763-0326).

D. The Parties Present Evidence and Conduct Cross-Examination in a Two-Stage Contested Case.

Following the April 2021 Order on Enbridge's Motion In Limine, the parties proceeded with the submission of evidence in the contested case. On September 14, 2021, the Tribal Intervenors, along with Staff and other intervening parties, pre-filed their direct testimony. Rebuttal testimony was then pre-filed on December 14, 2021 by the Tribal Intervenors, along with other intervening parties, Staff, and Enbridge.

Evidence was offered that described the negative impacts that the construction, operation, and maintenance of the Project would have on the Tribal Nations and their treaty-protected resources. See, e.g., Gravelle Direct, 10 Tr 1415-21 (TI Appendix H at 648-54); Hemenway Direct, 9 Tr 1192-93 (TI Appendix I at 669-70); Wiatrolik Direct, 9 Tr 1181-86 (TI Appendix J at 673-78); LeBlanc Direct, 10 Tr 1514 (TI Appendix K at 682). The evidence, however, was limited at every turn. Relying on the Motion In Limine ruling, Enbridge filed a motion to strike entire passages of evidence, which the ALJ granted on the basis that the evidence was "outside the scope" of the case under the Commission's April 2021 Order. See January 13, 2022 Order (Doc No. 20763-1009).

The evidence that was stricken included testimony from Jacques LeBlanc, a tribal fisherman, pertaining to the "continued operation of Line 5 and reliance on fossil fuels." *Id*. at 6.

The ALJ characterized Mr. LeBlanc's testimony about the impact of pollution and impairment to fisheries, a vital economic and cultural resource, as "a generalized concern over the effects of climate change," and "consistent with the April 2021 Order," granted Enbridge's motion to strike. *Id*. at 6-7. The ALJ also struck the testimony and sponsored exhibits of Frank Ettawageshik, a tribal leader and climate change expert, on the basis that it addressed the effects of greenhouse gas emissions beyond the four-mile stretch of the Straits crossing, which it claimed too was outside the scope articulated in the April 2021 Order. *Id*. at 8. Also stricken was testimony offered by John Rodwan, NHBP's Environmental Department Director, which included the only evidence offered in this matter regarding the actual effects of an oil spill on wild rice and other tribal resources experienced by Tribal Nations following a catastrophic release from an Enbridge pipeline. *Id.* at 15-16. Stricken testimony also included that of Bay Mills President Whitney Gravelle, which provided critical information about Tribal concerns, including concerns related to the alternatives analysis in the Dynamic Risk Report—the very report that the Commission later determined was "particularly informative in determining public need for the Replacement Project." *Id*. at 7-8; December 1, 2023 Order, p 300 (Doc No. 20763-1454) (TI Appendix A at 301).

Cross examination of witnesses and the binding in of testimony occurred between January 14 and January 24, 2022. 7 Tr 535 to 12 Tr 1890.

The Tribal Intervenors filed post-hearing briefs with the Commission on February 18, 2022 and appealed the ALJ's rulings on the motions to strike. Following this post-hearing briefing, on March 14, 2022, the ALJ filed a notice that the record was closed and transmitted to the Commission for consideration. (Doc No. 20763-1113).

On July 7, 2022, the Commission issued an order reopening the contested case to receive additional evidence. Order, p 47 (Doc No. 20763-1257). The parties submitted pre-filed direct and rebuttal testimony, and in April of 2023 the ALJ presided over a five-day hearing. Following the hearing, the parties submitted written briefs to the Commission and the record was again closed for review.

E. The Commission Approves Enbridge's Application.

On December 1, 2023, the Commission issued an order approving Enbridge's application. (Doc No. 20763-1454) (TI Appendix A). In its Order, the Commission articulated the long-standing legal standard it has developed for consideration of applications under Act 16:

> Pursuant to the requirements in Section 3(1) of Act 16, MCL 483.3(1), the Commission has developed and applied a three-part test to determine whether to grant an Act 16 application: "(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." [*Id*. at 36-37 (TI Appendix A at 37-38) (emphasis added), citing prior orders in this case and other Act 16 cases.]

The Commission also acknowledged its obligation to review Enbridge's application in light of the requirements imposed by the Michigan Environmental Protection Act ("MEPA"): "In addition, pursuant to MCL 324.1705, the Commission must perform a MEPA review in pipeline siting cases." *Id.* at 37 (TI Appendix A at 38).

With respect to the public need prong of its Act 16 analysis, the Commission reviewed record evidence and then stated:

> [T]he Commission finds that Enbridge has established both the public need for the products to be shipped through the Replacement Project and the need to relocate the Straits Line 5 segment inside the tunnel, and as such, has established the public need for the Replacement Project. [*Id*. at 305 (TI Appendix A at 306).]

With respect to MEPA, the Commission concluded that the proposed project would likely "pollute, impair and destroy natural resources," but that "there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA." *Id*. at 331, 347 (TI Appendix A at 332, 348). To reach this conclusion, the Commission assessed oil spill risk and potential impairment from hundreds of miles of alternative transportation routes, but it only examined oil spill risk from Line 5 as it pertained to the four-mile section to be placed in the tunnel.

STANDARD OF REVIEW

A final order of the PSC must be authorized by law and be supported by "competent, material, and substantial evidence on the whole record." Const 1963, art 6, § 28; *In re Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). A party aggrieved by a final order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8).

"To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment." *In re Consumers Energy Co to Increase Rates*, 338 Mich App 239, 242; 979 NW2d 702 (2021), citing *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

"Issues of statutory interpretation are reviewed de novo." *In re Detroit Edison Co Application*, 296 Mich App 101, 107; 817 NW2d 630 (2012), citing *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). "A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference." *Id.*; see also *Grass Lake Improvement Bd v Dep't of Env't Quality*, 316 Mich App 356, 363; 891 NW2d 884 (2016) ("'Respectful consideration' of an agency's statutory interpretation is not akin to 'deference'"), citing *Rovas*, 482 Mich at 108. An appellate court reviews an agency's MEPA determinations de novo. *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 471; 554 NW2d 328 (1996); *West Michigan Environmental Action Council v. Natural Resources Comm*, 405 Mich 741, 752-753; 275 NW2d 538 (1979).

Under the Michigan Rules of Evidence, a party may claim error in a ruling to exclude evidence "only if the error affects a substantial right of the party" and the party "informs the court of its substance by an offer of proof, unless the substance was apparent from the context." MRE 103(a)(2).

ARGUMENT

The Tribal Intervenors have identified two independent reasons why a reversal and remand to the Public Service Commission is appropriate in this matter.

First, the Commission's December 2023 Order was unlawful because the Commission had barred the intervening parties from introducing evidence related to the public need for and continued operation of Line 5, but relied on record evidence presented by other parties to find that the public need prong of Act 16 was satisfied. The Commission's actions with regard to its Motion In Limine ruling and its final order were legally inconsistent, violated the Tribal Intervenors' rights under the APA and MRE, and perpetuated mischaracterizations of Tribal Intervenors' arguments to the benefit of the applicant—leading to several erroneous conclusions about the relevance of public need evidence under Act 16.

Second, the Commission's final order was unlawful because the Commission had barred evidence relating to the history of oil spills and risks of oil spills that would directly result from the project but considered broad oil spill risks associated with alternatives in its MEPA analysis. The Commission's MEPA analysis in its final order was unlawfully limited with the one-sided admission of evidence and failed to consider a crucial aspect—the perpetuation of oil spill risks

beyond the Straits—as a direct effect of the proposed action. This MEPA analysis was also internally inconsistent with the Commission's analysis of the effects of greenhouse gas emissions—which was *not* limited to the Straits crossing.

Tribal Intervenors assert that the Commission erred in interpreting its obligations under Act 16 and MEPA in deciding, as a matter of law, that evidence about (1) the public need for Line 5 and (2) the risk of oil spills from Line 5 was irrelevant to its consideration of Enbridge's application. The Commission's interpretation of its statutory obligations violated a substantial right of the Tribal Intervenors to present critical evidence in support of their position. MRE 103(a); MCL 24.272(3).

I. THE COMMISSION ERRED WHEN IT BARRED THE INTERVENING PARTIES FROM SUBMITTING EVIDENCE RELATED TO THE PUBLIC NEED FOR LINE 5 AND THEN CONCLUDED THAT ENBRIDGE HAD ESTABLISHED A PUBLIC NEED FOR THE PIPELINE.

In its ruling on Enbridge's Motion In Limine, the Commission barred the intervening parties from introducing evidence related to the public need for and continued operation of Line 5. Yet, in its final order, the Commission concluded that Enbridge had demonstrated a public need for the pipeline and the fossil fuel products it transports. In doing so, the Commission relied on, and cited to, record evidence in support of its conclusion. Thus, the Commission's final order was inconsistent with its prior rulings on the Motion In Limine because it allowed the applicant, Enbridge, to submit evidence on a contested factual matter, but did not allow the Tribal Intervenors to submit evidence to counter Enbridge's presentation.

The Commission's actions violate the Tribal Intervenors' rights under the APA and MRE. The Tribal Intervenors had the right to submit relevant evidence on the factual issues being resolved in the contested case. By granting Enbridge's Motion In Limine, the Commission committed legal error that deprived the parties of this right.

Furthermore, evidence of the public need for Line 5 and the products it ships is directly relevant to the issues raised in Enbridge's application. Therefore, the Commission's decision must be reversed, and the case should be remanded for further proceedings in which the intervening parties are given the opportunity to conduct discovery and submit evidence related to the public need for Line 5 and the products it transports.

A. The Commission's Final Order Is Inconsistent with Its Prior Ruling on Enbridge's Motion In Limine.

In its final order in the contested case, the Commission made factual findings on exactly the set of issues that it ruled were outside the scope of the case—namely, the public need for Line 5 and the products it ships. Specifically, the Commission held:

> In conclusion, the Commission finds that Enbridge has established both the public need for the products to be shipped through the Replacement Project and the need to relocate the Straits Line 5 segment inside the tunnel, and as such, has established the public need for the Replacement Project. [December 1, 2023 Order p 305 (Doc No. 20763-1454) (TI Appendix A at 306).]

In reaching this conclusion, the Commission relied on and referenced record evidence that did not simply address the public need to replace the Dual Pipelines with a single pipeline in a tunnel, but also addressed the public need to preserve and extend the pipeline's continued operation. First, the December 1, 2023 Order quoted from the First Agreement[4] between the State of Michigan and Enbridge regarding the proposed tunnel, dated November 27, 2017: "[T]he continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of propane to meet the needs of Michigan citizens, supporting businesses in Michigan, and transporting essential products, including Michigan-produced oil to refineries and manufacturers . . . ." *Id*. at 297 (TI Appendix A at 298). The Commission also noted that this same sentence, which it characterized as a "sentence regarding public need for the continued operation of Line 5," was also present in the Second Agreement between the State of Michigan and Enbridge, executed on October 3, 2018. *Id*. at 298 (TI Appendix A at 299). Thus, in reaching a conclusion about the public need for the "Replacement Project," the Commission cited to and discussed record evidence about the "continued operation of Line 5"—the topic that it previously held was outside the scope of the case.

[4] The State of Michigan and Enbridge executed a series of agreements during the Snyder administration. In the proceedings below, these agreements were referred to as the First Agreement (Exhibit A-8), the Second Agreement (Exhibit A-10), the Third Agreement (Exhibit A-1), and the Tunnel Agreement (Exhibit A-5). (Doc No. 20763-0003). The First and Second Agreements culminated in the Tunnel Agreement, which recognized the roles and required approvals of state and federal agencies necessary to complete this project. Exhibit A-8 at 4.1, 4.2. These agreements between the State and a private party did not—and could not—revoke, revise, or diminish the applicability of Act 16, the APA, MEPA, or other laws governing this proceeding.

In its final order, the Commission made additional explicit findings about the public need for Line 5, stating:

> In the present case, the public need is not based on the need for additional capacity, but on the ongoing reliance on the current capacity of the dual pipelines, even as other sourcing options emerge. Furthermore, the Commission finds that there is substantial evidence on the record in the present case to show that if the dual pipelines are damaged, deemed inoperable due to safety concerns, or shutdown, Line 5 in Michigan may be abandoned in full or in part, which will require higher-risk and costlier alternative fuel supply sources and transportation to Michigan customers than what is proposed in the Replacement Project. *See*, ELP-24, pp. 278, 300; 8 Tr 906, 908-919; 12 Tr 1777-1778. Thus, the Commission finds that there is a public need for the products shipped through the Straits Line 5 segment. [*Id*. at 302 (TI Appendix A at 303).]

Here, the Commission made a factual finding that there is an "ongoing reliance on the current capacity of the dual pipelines"—the exact type of evidence that it had barred from the case. Also, the Commission explicitly stated here, that after reviewing the record evidence, it "finds that there is a public need for the *products* shipped through the Straits Line 5 segment"—the topic that it barred the intervening parties from submitting evidence about. Finally, the Commission found that "other sourcing options" have emerged, and that if the Dual Pipelines are inoperable or shut down, the State will have to rely on "higher-risk and costlier alternative fuel supply sources and transportation." *Id*. at 302 (TI Appendix A at 303), citing, *inter alia*, Dynamic Risk's 2017 Alternatives Analysis for the Straits Pipeline (Exhibit ELP-24).[5] Yet, these topics were deemed off-limits by the Commission when it barred the intervening parties from submitting evidence about the public need for and continued operation of Line 5.

The Commission's erroneous order on the Motion In Limine had a significant impact on the development of the factual record about public need that the Commission ultimately referenced in determining there was a public need for the proposed tunnel. Pursuant to the order, the parties could not conduct discovery or offer evidence about the public need for Line,

[5] The Commission's reliance on Exhibit ELP-24 (Dynamic Risk's 2017 Alternatives Analysis for the Straits Pipeline) for its conclusions about alternative fuel supply sources and transportation is concerning because the report is over six years old, involved a different tunnel design, and only looked at alternatives individually, instead of considering the use of a combination of alternative transportation methods to deliver Line 5 products. But, in any event, because the Commission did rely on the Dynamic Risk Report in finding that there is a public need for Line 5, the intervening parties should have been permitted to submit their own, more current evidence on that topic.

including the need for the current capacity of the pipeline and the specific propane and oil products transported by it.

In the briefing about the Motion In Limine, the Tribal Intervenors and other parties opposing the motion explicitly stated that they wished to submit evidence on these topics. For example, in its application for leave to appeal the ALJ's first decision on the Motion In Limine, intervenors MEC, GTB, TOMWC and NWF made an offer of proof stating that they wished to submit evidence regarding "the public need for the tunnel replacement project to secure and extend the service life of Line 5 over both short- and long-term time horizons." Doc No. 20763-0419, p 9.[6] This offer of proof was accompanied by the CV of Dr. Elizabeth A. Stanton, Ph.D., the Director and Senior Economist at Applied Economics Clinic. *Id.*, Exhibit 1.

And, of course, testimony from Dr. Stanton is not the sum total of all evidence that could have been submitted on this topic.[7] If permitted to do so, the intervening parties would have submitted an expert analysis about the public need for the pipeline, including an examination of energy markets, the continuing transition to clean energy sources, and the myriad options for meeting energy needs through the use of fossil fuel products and cleaner energy sources. Discovery on these topics would have informed this expert analysis. Tribal voices would have also informed the analysis of the public need for Line 5 had the Tribal Intervenors' testimony not been stricken as "outside the scope" of the case as articulated in the Motion In Limine ruling. For example, what was characterized as a "generalized concern over the effects of climate change" in Mr. LeBlanc's testimony was in fact evidence directly related to the public need for Line 5, including the negative impact of the continued use of Line 5 on Tribal and local economies.

In summary, the Commission did not play by its own rules, acting inconsistently in issuing a final decision that contradicts its prior order on the Motion In Limine. After ruling in

[6] The Tribal Intervenors incorporated by reference this offer of proof in their application for leave to appeal the ALJ's ruling on the Motion In Limine, filed on March 9, 2021. (Doc No. 20763-0622).

[7] Although Dr. Stanton did testify in this matter, the purpose of her testimony was limited by the Motion In Limine rulings to her opinion on the lack of consideration of a no-action alternative in the context of the MEPA alternatives analysis. December 1, 2023 Order, p 124 (Doc No. 20763-1454) (TI Appendix A at 125), citing 9 Tr 942 (TI Appendix L at 693). In keeping with the Motion In Limine ruling, she did not offer a complete analysis of the short- and long-term energy markets, including the economics of fossil fuel pipelines, as would relate to the issue of the public need for Line 5 and the products it transports.

response to Enbridge's Motion In Limine that the intervening parties could not submit evidence about the public need for and continued operation of Line 5, the Commission made factual findings on exactly that topic. It cited to record evidence and made findings about the public need to maintain the current capacity of Line 5 and the public need for the Line 5 products that would be shipped through the tunnel (which are the same products shipped through the rest of the line). Evidence on these topics is evidence about the "public need for and continued operation of Line 5," which the Commission had previously barred.

B. The Commission's Ruling on Enbridge's Motion In Limine Violates the Intervening Parties' Rights Under the Michigan Administrative Procedures Act and the Michigan Rules of Evidence.

The Commission's decision barring the intervening parties from submitting evidence about the public need for Line 5 was unlawful because it violated the intervening parties' rights under the APA and MRE. The Tribal Intervenors should have been provided the opportunity to submit evidence about the public need for Line 5 because evidence about the need for the pipeline and the products it transports was introduced by Enbridge in its application and the Commission made findings of facts about public need in its final order.

Under the APA, "[t]he parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." MCL 24.272(3). The APA further provides: "A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence." MCL 24.272(4). The right to present witnesses, evidence, and argument and to confront adverse witnesses and evidence is part of the "rudimentary due process" that is required in administrative proceedings. See, e.g., *Sponick v City of Detroit Police Dep't*, 49 Mich App 162, 188-189; 211 NW2d 674 (1973), citing *Goldberg v Kelly*, 397 US 254 (1970). Thus, under the APA, the Tribal Intervenors had a due process right to submit evidence on factual issues set forth in Enbridge's application and evidence, and on issues of fact ultimately resolved by the Commission.

The Commission's decision to prohibit the submission of evidence on factual issues that it then evaluated and resolved in its final order also runs afoul of the Michigan Rules of Evidence. MRE 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or

other rules adopted by the Supreme Court."[8] MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, under the MRE, the Tribal Intervenors had a clear and substantial right to submit evidence on factual issues raised and resolved in the contested case.

Evidence about the public need for and continued operation of Line 5 is relevant to the evaluation of Enbridge's application under Act 16. First, foremost, and dispositively, the final order in this case reveals that the Commission itself ultimately agreed that facts about the public need for and continued operation of Line 5 were of consequence in its analysis. As described above, the Commission made explicit findings about the need for the current capacity of the pipeline and the products it transports. For this reason alone, this case must be remanded to provide the Tribal Intervenors with the right to submit evidence about the public need for Line 5 and the products it transports.

Second, the Commission's decision about the Motion In Limine should be reversed because it was apparent from the outset of the case that the public need for Line 5 was central to the its consideration of Enbridge's application. Indeed, it is perhaps not surprising that the Commission ultimately made factual findings about the public need for Line 5 because Enbridge put the issue front and center in its Application. The Application states that the project includes a lease that will entitle Enbridge to occupy the tunnel in the Straits for 99 years. Enbridge Exhibit A-5, p 34, § 5.3 (Doc No. 20763-0003). Enbridge witness Marlon Samuel, whose testimony was submitted with the Application, stated:

> Given the existing amount of supplies ***and the continued expected demand***, this utilization of Line 5 is expected to continue into the future well after the completion of the Project because ***there is lack of sufficient capacity on other pipelines to serve these markets*** and transport these volumes and types of light crude oil, light synthetic crude and NGLs. [Samuel Testimony, 7 Tr 757 (TI Appendix F at 640) (emphasis added).]

Furthermore, in its Application, Enbridge states: "Line 5 Provides Needed Energy Transportation." Application, p 5 (Doc No. 20763-0001) (TI Appendix M at 698). The Application also quotes the sentence from Enbridge's First Agreement with the State of

[8] Citations to the Michigan Rules of Evidence are to the version of the rules that was in effect at the time the Commission issued its final order on December 1, 2023.

Michigan about how the continued operation of Line 5 serves important public needs by providing propane and transporting essential products such as oil to refineries and manufacturers—the very sentence that the Commission quotes in its final decision to support its conclusion that Enbridge has established the public need for the products transported by Line 5. Compare Enbridge's Application, p 10 (TI Appendix M at 703), with Commission's December 1, 2023 Order, p 297 (TI Appendix A at 298). The Application also states that the products transported by Line 5 "will continue to be converted into refined petroleum products, such as gasoline and aviation fuels, as well as propane, to meet the needs of Michigan and the surrounding region." Application, p 13 (TI Appendix M at 706). Given Enbridge's repeated statements about the public need for Line 5 in its Application and the Commission's ultimate reliance on those statements in its final decision, it was a violation of the APA and MRE—and fundamentally unfair—to prohibit the intervening parties from conducting discovery and submitting evidence on the same issue.

C. The ALJ and Commission Erred In Their Legal Analysis of the Relevance of Evidence About the Public Need For Line 5.

The ALJ's erroneous decision to prohibit the intervening parties from submitting evidence about the public need for Line 5 and the products it transports—a decision which the Commission upheld—relied on mischaracterizations of the arguments made by the Tribal Intervenors and the other intervenors who opposed the motion. This led to several erroneous conclusions about the relevance of the public need evidence.

First, contrary to the ALJ's framing, the intervening parties who opposed the Motion In Limine did not seek to expand the scope of the contested case. See February 23, 2021 Ruling, p 14 (Doc No. 20763-0602) (TI Appendix C at 392). Rather, as discussed above, Enbridge established the scope of the case in its Application and supporting materials—a scope that included evidence addressing the public need for Line 5 and its continued operation. The parties opposing the motion simply wished to present evidence and conduct discovery on issues raised by Enbridge, which they had an unequivocal right to do under the APA and MRE. Thus, the Motion In Limine is more fairly characterized as an attempt by Enbridge to ***limit*** the scope of the case, rather than an attempt by the parties opposing the motion to expand the scope of the case.

Second, contrary to the ALJ's characterization, the parties opposing the Motion In Limine did not seek to litigate the public need issue to ultimately obtain a determination that a

public need does not exist for Line 5. See *id*. at 17 (TI Appendix C at 395). Here again, the ALJ misstates the Tribal Intervenors' position. Evidence about the public need for and continued operation of Line 5 relates to the ultimate question of whether there is a public need to construct a tunnel that will extend the operational life of Line 5 for decades. In other words, the public need issue in the case is not whether there is a public need for Line 5 today in its current configuration. Rather, it is a question of whether the projected need for the pipeline justifies authorizing investment in a massive fossil fuel infrastructure project designed to operate for decades. The answer to this question can only be determined through a robust examination of energy markets, the projected need for the products shipped by Line 5, and the impact of the State's continuing transition to clean energy sources. The intervening parties opposing the Motion In Limine were deprived of their right to offer evidence on these issues.

Third, the ALJ and the Commission conflated the questions of whether there is a public need for the project to extend the operation of Line 5 for decades into the future with the question of whether any original finding of public need for Line 5 remains in effect. In the ruling on remand, the ALJ concluded that the parties could not present evidence about the public need for Line 5 because a 1953 order of the Commission ("1953 Order") "establishes that Line 5 serves a public need and is in the public interest," and that this determination "remains in effect today." *Id*. at 16. Furthermore, in his initial ruling on the Motion In Limine, the ALJ stated that the Commission's public need determination in 1953 was affirmed in *Lakehead Pipe Line Co v Dehn*, 340 Mich 25; 64 NW2d 903 (1954). October 23, 2020 Ruling, p15 (Doc No. 20763-0396) (TI Appendix B at 368). The Commission agreed with the ALJ's analysis of the 1953 Order and *Dehn*, noting that "[n]othing in the Commission's 1953 order set a termination date for the operation of Line 5 . . . ." April 21, 2021 Order, p 61 (Doc No. 20763-0602) (TI Appendix D at 466). In essence, the ALJ and the Commission concluded that information about the public need for Line 5 was irrelevant because the public need for the pipeline had been conclusively established by the 1953 Order.

Here again, the ALJ and the Commission mischaracterize the position of the intervening parties. No intervening party sought to introduce evidence in the contested case to challenge any determination made in 1953. Rather, the Tribal Intervenors and others sought to introduce evidence of whether there was a public need sufficient to support the authorization of a massive fossil fuel infrastructure project that will extend the operation of Line 5 for decades and destroy

Michigan's natural resources—including treaty-protected resources that are culturally and economically vital to Tribal Nations. Whether there is a public need for such a project is entirely different than—and does not implicate—a decision made over seventy years ago to permit the construction of Line 5.[9]

Fourth, the ALJ erroneously concluded that the submission of evidence about the public need for Line 5 and the products it transports would somehow implicate or challenge Enbridge's current license to operate Line 5. See February 23, 2021 Ruling, pp 16-17 (Doc No. 20763-0602) (TI Appendix C at 394-95). Relying on this mischaracterization of the position of the intervening parties who opposed the motion, the ALJ stated that a challenge to Enbridge's current license raised notice and due process concerns, citing Section 92(1) of the APA and *Rogers v Michigan State Bd of Cosmetology*, 68 Mich App 751; 244 NW2d 20 (1976). *Id*. The ALJ noted that, under Section 92(1) of the APA, "proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license" call for specific procedural steps to properly notify the licensee. *Id*.

The ALJ's concern about due process was entirely unfounded. No intervening party requested revocation of Enbridge's current license. Instead, they have requested the denial of a *new* license. In short, because the ALJ's concerns about notice and due process rested on a fundamental mischaracterization of the position of the intervening parties who opposed the motion, they cannot form the basis for granting the motion.

Finally, the ALJ erroneously dismissed the argument that the proposed tunnel would have the effect of extending the lifespan of Line 5 as "speculative." *Id*. at 15, n 8 (TI Appendix C at 393). The intervening parties opposing the motion argued that because the tunnel would extend the pipeline's lifespan—indeed, that is the very reason why Enbridge seeks to construct it—the public need to extend the lifespan must be considered when evaluating the tunnel application. In

[9] Furthermore, the ALJ and Commission's conclusion that the 1953 Order and the Michigan Supreme Court's decision in *Dehn* established the public need for Line 5 is incorrect. The Commission's 1953 Orders made no findings with respect to the public need for the pipeline now called Line 5. Enbridge Exhibit A-3 (Doc No. 20763-0003). The Commission simply dismissed without comment an objection that the project was not in the public interest. *Id*. at 8. Similarly, in *Dehn*, the Michigan Supreme Court held that Enbridge's predecessor could exercise the right of eminent domain to secure right-of-way for the pipeline. It did not explicitly address whether there was a public need for the pipeline under Act 16, a standard that had not yet been articulated.

the briefing on the Motion In Limine, Enbridge disagreed, arguing that the tunnel would not necessarily extend the lifespan of the pipeline because Enbridge would continue to operate Line 5 indefinitely, regardless of whether the tunnel was built.

The ALJ's dismissal of the Tribal Intervenors' position on this issue as "speculative" ignores a whole host of considerations indicating that it is unlikely that Enbridge will be able to operate Line 5 indefinitely without the tunnel. In June 2019, the Michigan Attorney General filed suit in Ingham County Circuit Court seeking an order requiring Enbridge to shut down the operation of Line 5 in the Straits.[10] Should the Attorney General prevail in her suit, the pipeline will be shut down. And, in July 2020, as the parties were litigating the matter, the pipeline was in fact shut down for 19 days (and operated at half capacity for another 64 days) by order of the circuit court after one of the anchors supporting in fact shut down for 19 days the pipeline on the lakebed of the Straits was damaged. Temporary Restraining Order, *Nessel v Enbridge Energy, Ltd*, No. 19-474-CE (Ingham Co Cir Ct, June 25, 2020); Stipulation to Modify Second Amended Temporary Restraining Order, *Nessel v Enbridge Energy, Ltd*, No. 19-474-CE (September 9, 2020). The uncertainty about the ultimate outcome of the Attorney General's litigation does not make "speculative" the argument that the tunnel would extend the lifespan of the pipeline. Rather, the existence of the litigation makes the permanent shutdown of the Dual Pipelines a very real possibility. And, as noted earlier, in November 2020, the Governor and the Department of Natural Resources revoked and terminated the easement that allows Enbridge to operate Line 5 in the Straits, further evidencing the State's commitment to shut down the Dual Pipelines. See Notice of Revocation & Termination of Easement, Exhibit ELP-18 (Doc No. 20763-1046) (TI Appendix N). In short, the challenges to the continued operation of Line 5 are concrete, and as a result, the intervening parties should have been permitted to present evidence about whether there is a public need to build a tunnel in order to perpetuate the continued operation of the pipeline for decades.

[10] The Attorney General's case asserts claims under the public trust doctrine, the common law of public nuisance, and MEPA. Enbridge removed the case to federal court in December 2021, almost two and a half years after it was filed, The Attorney General moved to remand the case to state court. The remand motion was denied, and the Attorney General filed an interlocutory appeal with the United States Court of Appeals for the Sixth Circuit. *Nessel v. Enbridge Energy, LP*, No. 23-1671. The appeal is pending.

For the foregoing reasons, the Commission's decision barring the intervening parties from introducing evidence about the public need for and continued operation for Line 5 should be reversed and the matter should be remanded with instructions that the parties be provided the opportunity to submit evidence on this issue.

II. THE COMMISSION VIOLATED MEPA WHEN IT PREVENTED INTERVENING PARTIES FROM SUBMITTING EVIDENCE ABOUT THE RISKS OF, AND LIKELY POLLUTION FROM, OIL SPILLS FROM LINE 5.

The decision to grant Enbridge's Motion In Limine also contaminated the Commission's MEPA analysis, resulting in another legal error necessitating reversal and remand. MEPA requires the Commission to conduct a comprehensive review of how Enbridge's proposed tunnel will likely pollute natural resources and then consider alternatives to those harmful consequences. Here, by excluding categories of evidence related to the likely harm caused by the proposed project, the Commission failed to satisfy MEPA's mandate. Specifically, the Commission prohibited the parties from introducing evidence about the history of oil spills from Line 5 and the risks that its continued operation poses. But such evidence relates directly to the likely harms associated with approving the project because construction of the proposed tunnel will have the effect of sustaining and extending the operation of the pipeline in Michigan. Because the pipeline will operate far longer if the tunnel is approved, the perpetuation of known oil spill risks is a direct effect of the proposed action. Therefore, the intervening parties should have been permitted to conduct discovery and develop evidence on the history and risks of oil spills from Line 5.

A. MEPA Requires a Robust Review of Both the Environmental Harms Associated with the Proposed Tunnel Project and the Existence of Feasible and Prudent Alternatives.

MEPA requires a broad assessment of the likely effects of a project to determine whether, and to what extent, a project will pollute, impair, or destroy water and other natural resources in Michigan, including a comparison to project alternatives. Section 5(2) of MEPA provides:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the *alleged pollution, impairment, or destruction of the air, water, or other natural resources*, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has *or is likely to have* such an effect *if there is a feasible and prudent alternative* consistent with the reasonable

> requirements of the public health, safety, and welfare. [MCL 324.1705(2) (emphasis added).]

The Michigan Supreme Court acknowledged and explained the obligation of state agencies to comply with MEPA in *Vanderkloot*, 392 Mich at 183-185. *Vanderkloot* recognized that MEPA does not "merely provide a separate procedural route for protection of environmental quality, it also is a source of supplementary substantive environmental law." *Id*. at 184.

As stated in the statute, the consideration of environmental effects under MEPA must be comprehensive. The phrase "likely to have such an effect" requires an agency to undertake a broad consideration of the potential effects of the conduct under review. The word "effect" must be given its common and ordinary meaning. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 159; 615 NW2d 702 (2000), citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22; 528 NW2d 681 (1995). "Effect" means "something produced by an agent or cause; a result, outcome, or consequence." *Black's Law Dictionary* (11th ed 2019).

MEPA further requires agencies to consider the existence of feasible and prudent alternatives when it determines that the project will impair natural resources. MCL 324.1705(2); see also *Vanderkloot*, 392 Mich at 183-85. A proper evaluation of the potential effects of the proposed project is integral to the alternatives analysis because it is critical to compare the likely effects of the conduct under review to the likely effects of the alternatives. Put simply, the agency must make an "apples to apples" comparison to inform decisions that protect Michigan's natural resources in furtherance of public health, safety, and welfare.

In summary, consistent with the plain language of MEPA and the Michigan Supreme Court's decision in *Vanderkloot*, the Commission had an obligation to evaluate (1) all of the potential harmful environmental effects of the proposed tunnel project, and (2) the existence of feasible and prudent alternatives.

B. By Excluding Relevant Evidence About the Risks of, and Likely Pollution from, Spills from Line 5, the Commission Failed to Consider All of the Potential Effects of Its Action and, Therefore, Failed to Satisfy the Requirements of MEPA.

By upholding the ALJ's decision to grant Enbridge's motion to exclude evidence of the history and risks of oil spills from Line 5, the Commission failed to consider all the potential

effects of the proposed tunnel in violation of its obligations under MEPA.[11] A critical aspect of granting Enbridge's Application is that it would secure and extend the operation of Line 5 in Michigan for decades. Indeed, it is apparent for several reasons that Enbridge needs to construct a tunnel to continue operating Line 5 in Michigan. First, as noted earlier, Enbridge stated in its Application that it needed to construct a tunnel to continue delivering its products. See Section I.B., *supra*. Second, the Dual Pipelines are 71 years old. It is not reasonable to conclude that Enbridge will be able or permitted to operate them indefinitely. Third, the easement that allowed Enbridge to operate the Dual Pipelines has been revoked. Notice of Revocation & Termination of Easement, Exhibit ELP-18 (Doc No. 20763-1046) (TI Appendix N). Indeed, Enbridge characterized the revocation of the easement as a "shutdown order." Complaint, p 1, *Enbridge Energy, LP v. Whitmer*, No. 20-cv-01141 (WD Mich, November 24, 2020). Finally, the Attorney General is seeking to shut down the Dual Pipelines through litigation. *Nessel v Enbridge Energy, Ltd*, No. 19-474-CE (Ingham Co Cir Ct, 2019). In light of these considerations, it is only reasonable to conclude that the construction of the proposed tunnel would extend the operational life of Line 5 in Michigan.

Once the tunnel project is understood as having the effect of securing the operation of Line 5 for decades, it becomes apparent that the Commission erred in granting Enbridge's Motion In Limine. Evidence about the history and risks of oil spills from Line 5 relates directly to the effect that the tunnel would have in extending the operational life of Line 5. By securing and extending the operation of Line 5, the construction of a tunnel would also perpetuate the risks of oil spills from the pipeline. Therefore, the Commission should have allowed parties to develop and submit evidence regarding the risk of oil spills to the Great Lakes, inland waters, and other natural resources from Line 5 in Michigan. For example, if by conducting discovery and introducing evidence, the Tribal Nations showed that Enbridge will operate Line 5 in its current condition for three to five years if it does not undertake the Project but will operate it for 80 years if the Project is completed, then an additional 70+ years of operation is an effect of the conduct in this proceeding. The Commission then would have been able to adequately compare the resulting pollution and impairment from 70 years of Line 5's operation in Michigan with that

[11] The Michigan Supreme Court has held that an agency's "failure . . . to reasonably comply with those duties may be the basis for a finding of . . . abuse of discretion." *Vanderkloot*, 392 Mich at 190.

presented by alternative scenarios. Instead, the Commission granted Enbridge's request to limit the scope of the case by excluding evidence about the history and risks of oil spills from Line 5. As a result, the Commission did not evaluate all the environmental effects associated with its conduct and, therefore, failed to satisfy its obligations under MEPA.

The pollution consequences of an oil spill should have been a part of the Commission's MEPA analysis because oil is a pollutant that can negatively impact air, water, and other resources. See Tribal Intervenors' March 9, 2021 Application for Leave to Appeal, pp 27-28, 30-31 (Doc. 20763-0622). Citing researchers from Michigan Technological University, the Notice of Revocation and Termination of Easement recognizes, "[c]rude oil contains toxic compounds that would cause both short- and long-term harm to biota, habitat, and ecological food webs." Notice of Revocation & Termination of Easement, Exhibit ELP-18, p 8 (Doc No. U-20763-1046) (TI Appendix N at 720), citing Mich Tech Univ, *Independent Risk Analysis for the Straits Pipelines* (September 15, 2018), pp 166-69, 176, 181-85, <https://www.michigan.gov/psab/-/media/Project/Websites/psab/archive/media/Straits_Independent_Risk_Analysis_Final.pdf> ("Michigan Tech Report"). The Michigan Tech Report recognizes that an oil spill threatens natural resources, "including fish, wildlife, beaches, coastal sand dunes, coastal wetlands, marshes, limestone cobble shorelines, and aquatic and terrestrial plants, many of which are of considerable ecological and economic value. *Id*. at 8 (TI Appendix N at 720), quoting Michigan Tech Report at 165. The report specifically addresses the risk oil poses to fish and fish habitats:

> Fish species of ecological and economic importance are at risk for reductions in population due to oiling of spawning grounds and nursery habitats. Adult fish that are living and feeding in oil-contaminated sediments are also at risk; these include Lake Whitefish, an economically valuable species. [Michigan Tech Report at 214.]

The threat that oil products pose to the fishery resources is one of several concerns that motivated the Tribal Intervenors to intervene in this proceeding. See, e.g., LTBB Petition to Intervene, pp 3-5 (Doc No. 20763-0165); GTB Petition to Intervene, pp 3-5 (Doc No. 20763-0110). Tribal Intervenors have staff scientists who were prepared to testify about the critical resources threatened by an oil spill from Line 5. Tribal Intervenors' Petition for Leave to Appeal, pp 13-14, 27 (Doc No. 20763-0622). The intervening parties should have been permitted to develop these points and present evidence on them in the contested case.

Furthermore, as argued below, evidence about the oil spill risks presented by Line 5 is particularly relevant because a spill, rupture, or leak from Line 5 is likely. See Joint Petition for

Rehearing by Tribal Intervenors (Doc No. 20763-0767). Historically, Line 5 has been the subject of leaks and spills, and it is likely to have additional leaks and spills in the future. *Id*. at 5, citing NWF's Petition to Intervene, Affidavit of Bruce Wallace, p 4 (Doc No. 20763-0126) and Garrett Ellison, *Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years*, MLive (April 26, 2017), <https://www.mlive.com/news/2017/04/enbridge_line_5_spill_history.html>. Indeed, courts often require agencies to consider the likelihood and effects of an oil spill when conducting an environmental review or permitting a project that will involve the transport of oil, such as a pipeline or the construction of a port or dock for vessels that carry oil.[12] MEPA's mandate that "the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, *shall be determined*" requires that the intervening parties be permitted to submit evidence about the history and risks of oil spills from Line 5. MCL 324.1705(2) (emphasis added).

C. The Commission's Alternatives Analysis Failed to Comply with MEPA Because It Considered Oil Spill Risks Associated with Alternatives but not Those Associated with the Project Itself.

The Commission's exclusion of evidence about the history and risks of oil spills from Line 5 also led to an alternatives analysis that fails to comply with the requirements of MEPA. This Court has recognized that the "[p]roper application of MEPA's impairment standard requires a statewide perspective." *Thomas Twp v Sexton Corp*, 173 Mich App 507, 517; 434

[12] For example, in Minnesota, a court of appeals deemed the risk of an oil spill reaching Lake Superior from Enbridge's planned Line 3 to be an essential part of the environmental analysis of Line 3. *In re Enbridge Energy, LP*, 930 NW2d 12, 17 (Minn App, 2019); see also Tribal Intervenors' Petition for Leave to Appeal, p 31 n 88 (Doc No. 20763-0622), citing the Line 3 case. Recently, in *Standing Rock Sioux Tribe v US Army Corps of Engineers*, the court ruled that even if the risk of a pipeline leak may be low, that risk is sufficient to require its potential consequences to be considered as part of the environmental review involved in the approval of a pipeline's placement. 985 F3d 1032, 1049-50 (CA DC, 2021). In *Sierra Club v Sigler*, the court struck down a federal environmental impact statement for a dredging project that would allow increased oil tanker access in a port because its oil-spill analysis did not analyze the "worst case" scenario of an oil tanker spill. 695 F2d 957, 968-75 (CA 5, 1983). Similarly, *Ocean Advocates v US Army Corps of Engineers* held that the Corps was required to analyze risks of tanker oil spills before issuing a Section 404 permit for a dock extension, because "a 'reasonably close causal relationship' exists between the Corps' issuance of the permit, the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills." 402 F3d 846, 868 (CA 9, 2005), quoting *Dep't of Transp v Pub Citizen*, 541 US 752, 767 (2004).

NW2d 644 (1988). The Commission did not apply this standard in its alternatives analysis, applying a "statewide" perspective when looking at oil spill risk presented by various alternatives, but only examining risk in the Straits when considering the effects of the Proposed Project.

An examination of the Commission's alternatives analysis reveals this bias.[13] The Commission's alternatives analysis assessed environmental risk and potential impairment due to an oil spill from alternate methods of transport, including an alternate pipeline route and rail transportation, along the entire length of their route. *See* December 1, 2023 Order, pp 338-339 (Doc No. 20763-1454) (TI Appendix A at 339-40). For example, when discussing an "alternative southern pipeline route," the Commission stated that this alternative "would cross 8 rivers, 24 streams, 5 drainage canals, 231 miles of wetlands, 13 protected areas, . . . and could expose 11 well-head protection areas and two community drinking water well areas to a potential oil spill." *Id*. at 338 (TI Appendix A at 339), citing Exhibit ELP-24. Intervenors were not allowed to present similar evidence about Line 5's proximity to these natural features, the number or water crossings, or the integrity of the aging pipeline that may actually increase the impairment of these and other natural resources—including the Great Lakes—when compared to the alternative southern pipeline route. That evidence would have allowed for the correct "apples to apples" comparison of the impairments presented by the Proposed Project and its alternatives.

A proper comparison of the impairments would have compared the oil spill risks and potential impairment (including the threat to rivers, streams, drainage canals, wetlands, protected areas, drinking water sources, and the Great Lakes) presented by the hundreds of miles of Line 5 in Michigan with the hundreds of miles of the alternative southern pipeline route or other alternative methods of transportation. Instead, in what was akin to comparing a single apple to a giant apple orchard, the Commission compared the oil spill risk from a four-mile new pipeline segment in a tunnel—which replaces the current crossing that lacks the legal authority to operate—with that from a 762-mile-long potential alternative route. *Id.* at 331-32, 338 (TI Appendix A at 332-33, 339), citing Exhibit ELP-24. Unsurprisingly, given the illogical

[13] Courts have overturned orders where the Commission engaged in a lopsided analysis, looking at one side of an important issue while refusing to consider the inverse. *See Mich Consol Gas Co v Mich Pub Serv Comm*, 389 Mich 624, 640; 209 NW2d 210 (1973) ("In this case, the company showed that the commission, by refusing to consider increases in costs in the future while taking into account future reductions, acted arbitrarily and unreasonably.").

comparison, the Commission concluded that "the southern pipeline route" (i.e., 762 miles of pipeline) exhibits a greater failure frequency and safety risk when compared with the tunnel alternative (i.e., four miles of pipeline). *Id*. at 338 (TI Appendix A at 339). This utterly incongruent comparison led to an improper finding under MEPA.

The Commission committed the same error when considering potential impairment from the alternative involving rail transportation. It noted that rail transportation "is not prudent as it carries a greater likelihood of environmental harm" because it would "cross 11 rivers, 11 streams, 6 drainage canals, 6-7 miles of wetlands, 14 protected areas, and 72 miles of highly populated areas in Michigan." *Id*. The Commission further determined that alternative methods including rail or truck "will likely increase environmental impairment and may increase the threat of spills that could significantly damage the Great Lakes, the state's terrestrial environment, and more than 1,000 other aquatic environments in Michigan."[14] *Id.* at 303 (TI Appendix A at 304). Here, again, the Commission was unable to make the proper comparison of impairment because it barred intervening parties from submitting the information required to determine the impairment stemming from the Proposed Project.

In summary, the alternatives analysis is fatally flawed because it began with an overly narrow view of the effects and impairment of the Proposed Project. The Commission then relied on its artificially narrowed view of the Proposed Project's impairments when comparing them to the alternatives, for which it used the correct "statewide" view. To correct this error, the Commission's decision should be reversed and remanded with instructions to permit the intervening parties to submit evidence of all the potential effects of the proposed tunnel, including evidence about the history and risks of oil spills from Line 5.

D. The Exclusion of Evidence About the Risks of, and Likely Pollution from, Oil Spills from Line 5 Is Inconsistent with the Commission Order Regarding the Admissibility of Evidence About Greenhouse Gas Emissions.

The Commission's decision to permit the parties to submit evidence regarding GHG emissions also supports reversing its decision to exclude evidence about oil spill risks because

[14] Intervening parties were specifically barred from presenting evidence regarding the potential that a spill from Line 5 would have on the Great Lakes, even though it lies in very close proximity to Lake Superior, crosses tributaries as it traverses the Upper Peninsula, and crosses Lakes Michigan and Huron at the Straits of Mackinac.

the two pollutants—oil and GHGs—should be analyzed in the same way. With respect to GHGs, the Commission did not limit its analysis of the relevance of evidence to the four-mile segment of the pipeline that crosses the Straits. Instead, the Commission determined that the GHGs resulting from the products shipped through the pipeline must be considered under MEPA:

> It defies both well accepted principles of statutory interpretation as well as common sense to apply MEPA to a pipeline but not to the products being transported through it. As the Commission finds that conduct at issue in constructing the Replacement Project is indistinguishable from the purpose behind it or its result, the Commission's obligations under MEPA must also extend to the products being shipped through the Replacement Project. [April 21, 2021 Order, p 64 (Doc No. 20763-0713) (TI Appendix D at 469)].

As a result, the Commission denied Enbridge's Motion In Limine with respect to GHGs and permitted the parties to introduce evidence of the GHGs associated with the operation of the pipeline for decades to come.

A similar result should have been reached with respect to evidence about the history and risks of oil spills. As the Commission correctly noted, the GHG pollution caused by the continued operation of Line 5 is relevant to the MEPA determination of the project's polluting effects. *Id*. at 66-67 (TI Appendix D at 471-72). There is no analytically sound reason why the oil spill risks associated with the pipeline's continued operation should not be treated the same way.

For the foregoing reasons, the Commission erred in its interpretation of its obligations under MEPA. Its decision approving Enbridge's Application should be reversed and remanded with instructions that the parties be provided the opportunity to submit evidence regarding all of the potential environmental impacts associated with approving a tunnel that will have the effect of extending the operation of Line 5 for decades.

CONCLUSION AND RELIEF REQUESTED

The Tribal Intervenors respectfully request that this Court reverse the decision of the PSC to approve Enbridge's application and remand this matter to the PSC with instructions to allow the intervening parties to conduct discovery and submit evidence about (1) whether a public need exists to continue and extend the use of Line 5 through the construction of a tunnel, and (2) the perpetuation of oil spill risks along the length of Line 5 as a consequence of the construction of a tunnel.

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Respectfully submitted,

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