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General Counsel, Little Traverse Bay Bands of Odawa Indians
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August 3, 2020

Lisa Felice, Executive Secretary
Michigan Public Service Commission
7109 W. Saginaw Hwy.
PO Box 30221
Lansing, MI 48909
Via E-filing

RE: MPSC Case No. U-20763

Dear Ms. Felice:

Enclosed for filing in the above referenced case are:

1. Petition to Intervene by Little Traverse Bay Bands of Odawa Indians, and
2. Proof of Service.

Thank you for you assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.A. Bransky", with a stylized flourish at the end.

James A. Bransky

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the 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 Pursuant to 1929 PA 16; MCL 483.1 *et seq.* and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447

U-20763

PETITION TO INTERVENE BY

THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

1. The Little Traverse Bay Bands of Odawa Indians ("LTBB") seeks to intervene in this case under Rule 410 of the Commission's Rules of Practice and Procedure, R 792.10410, to represent the interests of its citizens in protecting and preserving rights reserved by Treaty with the United States.

2. LTBB is a sovereign federally recognized Indian tribe as reaffirmed by the United States in Public Law 103-324, 108 Stat. 2156 (1994), *see also* the United States Department of Interior's list of federally recognized tribes published annually in the Federal Register, 84 FR 1200-01.

3. The United States holds land in trust for LTBB in Mackinaw City, and other nearby locations in Emmet and Charlevoix Counties. LTBB's service area delineated in Public Law 103-324 encompasses 27 Counties, including Emmet, Cheboygan and Mackinac counties on both sides of the Straits of Mackinac. LTBB has approximately 4,600 enrolled citizens.

4. LTBB is a signatory to the Treaty of Washington of March 28, 1836, 7 Stat. 491 in which the signatory Odawa/Ottawa and Chippewa Tribes ceded almost 14 million acres of land, and large portions of Lakes Michigan, Huron and Superior that would become much of the State of Michigan in 1837.

5. In Article 13 of the 1836 Treaty, LTBB and the other signatory Tribes reserved the right to hunt, fish and gather throughout the ceded lands and waters, including the right of commercial and subsistence fishing on the Great Lakes. LTBB is an intervening-plaintiff Indian Tribe in the *United States v. Michigan* litigation (W.D. Mich. Case No. 2:73-CV-26) in which the federal court upheld the continued existence and exercise of the off-reservation Treaty rights on the Great Lakes, *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd. 653 F.2d 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981), and confirmed the Tribes' reserved usufructuary fishing, hunting, trapping and gathering rights in inland portions of the cession by the November 2, 2007 Inland Consent Decree (Dkt. 1799).¹

6. The Straits of Mackinac, through which Line 5 of Enbridge's Lakehead pipeline system extends and the proposed tunnel would be constructed, is at the epicenter of the cession area in which the Tribes reserved and continue to exercise commercial and subsistence fishing rights as confirmed in *United States v. Michigan* which has been pending in the federal court since 1973. The State of Michigan is obligated to honor and to not sanction any diminishment of the 1836 Treaty Tribes' off-reservation fishing rights in the Great Lakes including the Straits of Mackinac.

¹ The other 1836 Treaty signatory Tribes party to the *United States v Michigan* case are the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians and the Little River Band of Ottawa Indians.

7. LTBB, consisting of descendants of the Odawa that inhabited villages from Charlevoix to Cross Village, the Beaver Islands and the north shore of Lake Michigan before the arrival of Europeans, have fished northern Lake Michigan and especially the Straits of Mackinac for subsistence and commerce (Odawa means trader) since time immemorial. The exercise of subsistence and commercial fishing rights reserved in the Treaty of 1836 and affirmed by the Federal Court in the *United States v Michigan* case remain central to LTBB's culture, economy, and physical and spiritual well-being. An oil spill or geologic mishap from tunneling under the Straits would devastate LTBB beyond any economic valuation.

8. The Straits of Mackinac are critical spawning areas for numerous culturally significant fish species. This project could have serious negative impacts on Lake Whitefish, Lake Trout, Yellow Perch, Walleye, Smallmouth Bass, Alewife, suckers, and shiners which spawn in and near the Straits. These spawning grounds produce the vast majority of these species harvested by Tribal commercial fishers. These spawning populations would not only be gravely impacted by a spill from Line 5, but also from siltation discharged from outfalls from this tunnel project. Siltation can degrade the quality of spawning reefs and decrease offspring survival. Fish may uptake chemical constituents in the outflow which may result in further damage to the ecosystem and human health.

9. The tunnel project also threatens LTBB's inland off-reservation usufructuary Treaty rights. Habitat losses during construction and long-term would negatively impact the inland hunting, fishing and gathering rights confirmed in the *United States v Michigan* 2007

Inland Consent Decree, as well as harming two threatened flora species, Houghton's goldenrod and the Dwarf lake iris.

10. For the reasons stated above LTBB and its citizens are directly affected by Enbridge Energy, Limited Partnership's ("Enbridge") application for approval of its Line 5 replacement project, and the Commission's decision in this matter. LTBB has a deep substantial interest in protecting its reserved ceded territory Treaty rights to preserve the health and way of life of its current and future generations of Tribal citizens. This interest obligates LTBB to ensure that the natural resources in and connected to the Straits are not harmed by Enbridge's proposed project.

11. Enbridge is seeking the Commission's approval under Public Act 16 of 1929, MCL 483.1 *et seq.* ("Act 16") and Rule 447 of the Commission's Rules of Practice and Procedure, R 792.10447, to replace the segment of its Line 5 pipeline that crosses the Straits of Mackinac with a single pipe located within a tunnel. Enbridge requests this approval in the form of a grant of authority from the Commission.

12. Before the Commission can approve Enbridge's Act 16 request, the Commission will consider whether "(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 Enbridge Energy Limited Partnership*, Case No. U-17020, January 31, 2013, Order, p. 5.

13. LTBB and its citizens have the potential to be harmed if Line 5 continues to operate in the Straits of Mackinac, even if it is moved into a tunnel as Enbridge proposes. Specifically, LTBB and its citizens face a daily risk of harm from a release of oil and/or natural

gas liquid into the Straits from the existing aged underwater pipes. This risk will be prolonged for an indeterminate length of time if Enbridge waits until the tunnel is built and operational to decommission the aged underwater pipes. As set out above, the tunnel project itself exposes LTBB and its citizens to harm.

14. Climate change is already negatively impacting the Great Lakes fishery. In addition to the risk of an oil spill and the negative environmental impacts of the tunnel project, LTBB and its citizens are also harmed by the continued operation of Line 5 because it delays the transition to cleaner and more cost-effective low-carbon sources of energy and impedes efforts to mitigate the effects of climate change.

15. LTBB has documented numerous burial and other culturally significant sites that would be damaged or destroyed by this project.

16. The Michigan Public Service Commission recognizes two types of intervention:

a. First, intervention by right, which requires that the party will suffer an injury-in-fact as a result of the outcome of the case, and that the party is within the zone of interest protected by the statute. *See, e.g., Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 250 L Ed 184 (1970).

b. Second, permissive intervention, where the Commission has the discretion to permit a party to intervene in the case where that party can provide useful information to the Commission or a unique perspective on the issues in the case. *In re Application of The Detroit Edison Co for Authority to Increase its Rates*, Case Nos. U-15768 and U-15751, January 11, 2010, Order, p. 7.

17. LTBB meets both intervention tests. LTBB falls within the zones of interests protected by Act 16, will suffer injury-in-fact from the project, and can provide useful information to the Commission regarding fish habitat and the locations of cultural and historic resources.

18. The Commission has held that the Michigan Environmental Protection Act (“MEPA”) (MCL 324.1701 *et seq.*) applies to these types of proceedings. *See e. g. Application of DTE Electric Company for Approval of its Integrated Resource Plan*, Case No. U-20471, February 20, 2020, Order, p. 43. LTBB has standing to intervene under MEPA because this project “involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.” MCL 324.1705(1).

19. LTBB has organizational standing because its individual citizens meet the zone of interests test. *See In re Detroit Edison* at 8 (citing MPSC Rules of Practice and Procedure, Mich Admin Code R 460.17101(f), (g)(vii), and R 460.17201); *Drake v see also Detroit Edison*, 453 F Supp 1123, 1129 (WD Mich 1978).

20. This petition to intervene is timely.

21. LTBB requests that all notices and pleadings be served on:

James A. Bransky
jbransky@chartermi.net
9393 Lake Leelanau Drive
Traverse City, MI 49684-7713

and on:
Su Lantz, LTBB Executive Legal Assistant
slantz@ltbbodawa-nsn.gov

For the reasons above, the Little Traverse Bay Bands of Odawa Indians

respectfully requests that the Commission grant this petition to intervene and treat it as a party to this proceeding.

Date: August 3, 2020



James A. Bransky (P38713)
Attorney for Little Traverse Bay Bands of Odawa Indians
9393 Lake Leelanau Drive
Traverse City, MI 49684-7713
phone: (231) 946-5241
jbransky@chartermi.net

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Affidavit of Regina Gasco-Bentley

I, Regina Gasco-Bentley, being duly sworn, state:

1. I am the Tribal Chairperson of the Little Traverse Bay Bands of Odawa Indians.
2. I have personal knowledge of the allegations in the Little Traverse Bay Bands of Odawa Indians' Petition to Intervene in the case.
3. The factual allegations in the Petition concerning the Little Traverse Bay Bands of Odawa Indians and its citizens are true to the best of my information, knowledge and belief.
4. If called as a witness, I and Tribal staff could competently testify to the facts in the Petition to Intervene.

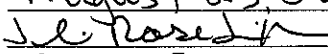
Affiant:


Regina Gasco-Bentley

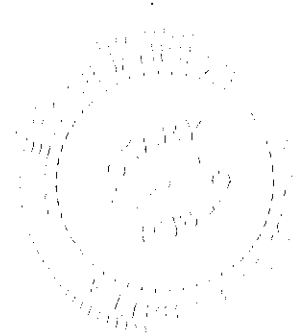
Subscribed and sworn to before me this 3rd day of August, 2020 by Regina Gasco-Bentley.

My commission expires:

Julie Rose Janiskee - Notary Public
Little Traverse Bay Bands of Odawa Indians
1114 Hazelton St., Petoskey, MI 49770
Acting in Little Traverse Bay Bands' Jurisdiction
Serial Number: 11-09
My Commission Expires: August 23, 2021

August 23, 2021

August 3, 2020

, Notary Public



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PROOF OF SERVICE

On August 3, 2020, I served a PDF copy of the PETITION TO INTERVENE BY THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS on the following:

Name/Party	E-mail Address
Counsel for Enbridge Energy, Limited Partnership Michael S. Ashton Shaina Reed Gregg Johnson	mashton@fraserlawfirm.com sreed@fraserlawfirm.com gregg.johnson@enbridge.com
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Counsel for Michigan Environmental Council (MEC) Christopher M. Bzdok Lydia Barbash-Riley Abigail Hawley	chris@envlaw.com lydia@envlaw.com abbie@envlaw.com

Counsel for Grand Traverse Band of Ottawa and Chippewa Indians (GTB) Bill Rastetter Christopher M. Bzdok Lydia Barbash-Riley	bill@envlaw.com chris@envlaw.com lydia@envlaw.com
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For Love Of Water (FLOW) James Olson	jim@flowforwater.org
Counsel for Bay Mills Indian Community (BMIC) Christopher M. Bzdok Whitney Gravelle Kathryn Tierney Deborah Chizewer Christopher Clark David Gover Matthew Campbell	chris@envlaw.com wgravelle@baymills.org candyt@bmic.net dchizewer@earthjustice.org cclark@earthjustice.org dgover@narf.org mcampbell@narf.org
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Date: August 3, 2020



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