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August 11, 2020

Ms. Lisa Felice, Executive Secretary
Michigan Public Service Commission
7109 W. Saginaw Hwy.
Lansing, MI 48917

RE: MPSC Docket No. U-20763

Dear Ms. Felice:

Attached for filing in the above-referenced matter, please find *Applicant Enbridge Energy, Limited Partnership's Limited Objections to the Notice of Intervention of the Attorney General*.

Thank you.

Very truly yours,

Fraser Trebilcock Davis & Dunlap, P.C.



Michael S. Ashton

MSA/ab
Attachments
cc: All counsel of record

**STATE OF MICHIGAN
BEFORE
THE MICHIGAN PUBLIC SERVICE COMMISSION**

**IN RE ENBRIDGE ENERGY, LIMITED)
PARTNERSHIP)
)
Application for the Authority to Replace and)
Relocate the Segment of Line 5 Crossing the)
Straits of Mackinac into a Tunnel Beneath)
the Straits of Mackinac, if Approval is)
Required Pursuant to 1929 PA 16; MCL)
483.1 *et seq.* and Rule 447 of the Michigan)
Public Service Commission’s Rules of)
Practice and Procedure, R 792.10447, or the)
Grant of other Appropriate Relief)**

Case No. U-20763

**APPLICANT ENBRIDGE ENERGY, LIMITED PARTNERSHIP’S
LIMITED OBJECTIONS TO THE NOTICE OF INTERVENTION OF
THE ATTORNEY GENERAL**

I. INTRODUCTION

On April 17, 2020, Enbridge Energy, Limited Partnership (“Enbridge”) filed its application, supporting testimony, and exhibits seeking to relocate the portion of its Line 5 pipeline from the lakebed of the Straits of Mackinac (“Straits”) to within a tunnel beneath the Straits (“Project”) pursuant to Public Act 16 of 1929 (“Act 16”). Enbridge’s application does not seek authority to construct the tunnel, but instead to relocate an approximately 4-mile portion of Line 5 that crosses the Straits (the “replacement pipe segment”) within the tunnel. This application results from the Michigan Legislature’s enactment of Public Act 359 of 2018 (“Act 359”) which allows the Line 5 Strait crossing to be relocated within a tunnel in order to fulfill an important State policy objective: to “essentially eliminate the risk of adverse impacts that may result from a potential

release from Line 5 at the Straits.” (The Second Agreement, Exhibit A-10, p.3.)¹ The relocation within a tunnel entirely eliminates the possibility of an anchor strike causing a release from Line 5, and provides multiple layers of protection (the pipeline, the tunnel with its concrete liner, and approximately 60 feet to 250 feet of earth) between the pipeline and the lakebed of the Straits.

Citing statutory and common law authority, the Michigan Attorney General has filed a notice of intervention in this proceeding on behalf of the people of the State of Michigan. (A.G.’s notice, at p. 2.) Even if the Attorney General has the right to intervene in this proceeding, she does not have the right to expand its scope. The purpose and scope of this proceeding is to effectuate the State’s policy objective to provide greater protection to the Great Lakes by relocating the Line 5 Straits crossing within a tunnel as envisioned by Act 359.

In the notice of intervention, the Attorney General seeks to inappropriately expand the scope of this proceeding in two respects. First, the Attorney General seeks to litigate whether the continued operation of Line 5 pending the completion of the Project is inconsistent with Part 17 (Michigan Environmental Protection Act) of the Natural Resources and Environmental Protection Act, MCL 324.1701, et seq. (“MEPA”). (A.G.’s notice p. 4.) But, the outcome of this proceeding has no impact on whether Line 5 will continue to operate. If the Commission approves Enbridge’s application, then the Line 5 Strait crossing will be relocated within a tunnel. If the application is denied, then Line 5 continues to operate in its current location. In either event, Line 5 will continue to operate. Therefore, Line 5’s continued operation will not be affected by the outcome of this proceeding and, accordingly, the issue of that operation is outside the scope of this proceeding.

¹ Act 359, which creates the multi-purpose utility tunnel for Line 5’s relocation, was overwhelmingly passed with bipartisan support. The House of Representatives approved by a 74 to 34 vote (House Journal 78, p. 2536) and the Senate approved by a 25 to 12 vote (Senate Journal 77, p. 2118). The Court of Appeals affirmed with finality the constitutionality of Act 359 in *Enbridge Energy, L.P. v. State of Michigan*, __ Mich. App. __, [2020 WL 3106841], (June 11, 2020). The State has not sought review in the Michigan Supreme Court and the deadline for seeking such review has passed.

It also bears note that the issue of the continued operation of the existing Line 5 pipelines across the Straits is currently being litigated by the Attorney General in a case she brought against Enbridge in 2019, in which she is seeking to permanently enjoin the operation of those pipelines on several grounds, including that their operation violates MEPA. *Nessel v. Enbridge Energy, Limited Partnership, et al.*, Case No. 19-474 (Cir. Ct, Ingham County). That issue and the other issues raised by the Attorney General in that pending litigation have no proper place in this proceeding, which concerns only the relocation of the Straits crossing.

Second, the Attorney General seeks to litigate whether the Project, once completed, will somehow “promot[e] continued, unnecessary consumption of fossil fuels, delay[] the transition to cleaner and more cost-effective sources of energy and impeded[e] efforts to mitigate the effects of climate change” in a manner that is inconsistent with MEPA. (A.G.’s notice p. 4.) But, the Commission’s decision in this proceeding does not impact the consumption of fossil fuels, the transition to cleaner and more cost-effective sources of energy, or efforts to mitigate the effects of climate change. The purpose and scope of this Act 16 proceeding is much less sweeping: to obtain approval to relocate Line 5 into a tunnel at the Straits crossing in order to eliminate perceived risks to the Great Lakes - - as envisioned by the Michigan Legislature through its passage of Act 359. The Michigan Legislature’s policy objective to protect the waters of the Great Lakes should not be held hostage by the Attorney General’s unrelated climate change agenda, which is completely outside the scope of the proceeding. The narrow scope of this proceeding is the relocation of an existing pipeline and not the broader question of whether any pipeline should exist or operate in the first instance.

Pursuant to Rule 412(1) (R 792.10412(1)), the Attorney General’s intervention should be limited to the relevant issues in this case. The actual issue presented by this Act 16 application is

whether Line 5 (specifically the replacement pipe segment) should be relocated within a tunnel. In deciding past Act 16 applications, the Commission stated that the relevant issues are 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. These issues do not include the impact of Line 5’s continued operations or climate change.

II. LEGAL ANALYSIS

A. THE PROPER SCOPE OF THIS PROCEEDING

In establishing the proper scope of this proceeding, it must be made clear that the Michigan Legislature has the authority to establish the policy for the State of Michigan. “[T]he constitutional arrangement in our state ... reposes in the legislative body the role of making public policy.” *Sington v. Chrysler Corp.*, 467 Mich. 144, 167; 648 N.W.2d 624 (2002). “[T]he propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination.” *Black v. Liquor Control Comm.*, 323 Mich. 290, 296; 35 N.W.2d 269 (1948). “The rule has become securely settled that all questions of policy are for the determination of the legislature.” *Rohan v. Detroit Racing Ass’n.*, 314 Mich. 326, 347; 22 N.W.2d 433 (1946) (citation omitted.)

With its passage of Act 359, the Michigan Legislature exercised its policy-making authority and overwhelmingly supported relocating Line 5 within a utility tunnel. In doing so, the Michigan Legislature specifically vested the Mackinac Straits Corridor Authority with the authority “to acquire, construct, operate, maintain, improve, repair, and manage” this multipurpose utility tunnel “joining and connecting the Upper and Lower Peninsulas of this state at the Straits.”

MCL 254.324a(1), MCL 254.324d(1) and MCL 254.324(e). The permitting of the tunnel is not a matter within the authority of this Commission, but rather, is being addressed by the Department of Environment, Great Lakes and Energy, as well as by the US Army Corps of Engineers. Enbridge's Act 16 application, therefore, does not seek authority to construct the tunnel, but instead, only to locate a small portion of Line 5 (the "replacement pipe segment") within the tunnel.

The issues in this Act 16 application proceeding are the same issues that the Commission addresses in other Act 16 applications. These issues are whether (1) the applicant has demonstrated a public need for the proposed Project (i.e., the relocation), (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.

B. MEPA DOES NOT PROVIDE A BASIS TO EXPAND THE SCOPE OF THE PROCEEDING TO INCLUDE THE CONTINUED OPERATION OF LINE 5, OR CLIMATE CHANGE

As an initial matter, MEPA does not require the Commission to allow the Attorney General to intervene to raise issues under MEPA, and MEPA does not require the Commission to conduct a contested case to satisfy MEPA. Further, the statutory language of MEPA limits the scope of the Commission's MEPA inquiry to the actual conduct that is the subject of the administrative review, and not environmental issues outside the scope of the administrative review, such as climate change as raised by the Attorney General.

MCL 324.1705(1) states:

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,

water, or other natural resources or the public trust in these resources. (emphasis added.)

The statute on its face states that the agency “may permit” the Attorney General to intervene and does not mandate intervention. The Attorney General’s reliance on other statutes or common law to assert the right to intervene and raise issues under MEPA is misplaced, given MEPA only allows for permissive intervention. See, e.g., *Tyra v. Organ Procurement Agency of Michigan*, 498 Mich. 68, 94; 869 N.W.2d 213 (2015), where the Court stated the “more specific statutory provisions control over more general statutory provisions,” quoting *Boodt v. Borgess Med. Ctr.*, 482 Mich. 1001, 1002; 756 N.W.2d 78 (2008) (Markman concurring).

The Commission’s past practice with respect to Rule 447 applications has been to deny permissive intervention based on MEPA and to satisfy the required MEPA inquiry without conducting a contested case hearing. See, *In re Encana Oil & Gas (USA) Inc.* April 16, 2013 Order, Case Nos. U-17195 and U-17196. This past practice has been upheld by the courts. In *Buggs v. Public Service Commission*, Case Nos. 315058, 315064, 2015 WL 159795 at p. 8 (Mich. App. Jan. 13, 2015), the court stated that to satisfy MEPA, the Commission is not required to grant interventions to third-persons, or even conduct a contested case hearing on the environmental impact of a project.

What’s more, the Attorney General failed to “fil[e] a pleading asserting” Enbridge’s conduct of locating the replacement pipe segment within a tunnel “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). Nowhere in her notice of intervention has the Attorney General claimed that the “conduct” of relocating the replacement pipe segment within the tunnel has or is likely to have the effect of polluting natural resources. Nor could she. The

tunnel's purpose is to *diminish* the likelihood of polluting natural resources, as the Legislature concluded.

Here, Enbridge's application seeks authority to locate a replacement pipe segment within a utility tunnel to offer additional protection to the Great Lakes, fulfilling the legislative policy objective envisioned by Act 359. Far from polluting natural resources, this conduct has the very opposite effect by offering additional protection to the Great Lakes. As recognized by the State of Michigan it will "essentially eliminate the risk of adverse impacts that may result from a potential release from Line 5 at the Straits." (The Second Agreement, Exhibit A-10, p.3.).

Moreover, the Attorney General impermissibly seeks to expand the scope of this case by arguing that the Commission's MEPA review should include the environmental impact of the *continued* operation of Line 5 during the Project's construction and the impact of Line 5 on climate change. Specifically, the Attorney General requests the Commission to deny Enbridge's application and reject the additional environmental protection to the Great Lakes in an effort to promote her climate agenda, which is wholly unrelated to this proceeding. The fact that this climate agenda is unrelated to this proceeding is demonstrated by the fact that whether the Commission grants or denies the application, Line 5 will continue to operate - - either in a tunnel or on the floor of the Great Lakes. Similarly, whether the Commission grants or denies the application, that decision will not have one iota of an impact on consumers' "consumption of fossil fuels," or "the transition to cleaner and more cost-effective sources of energy" or "efforts to mitigate the effects of climate change."

The Attorney General claims in her intervention notice that approval of Enbridge's application will result in "perpetuating the operation of the existing Line 5 pipelines and attendant unreasonable risk of releases of petroleum products in the waters of the Straits for years until the

Project is completed.” (Intervention Notice at 4.) What she overlooks is that the State expressly agreed in the December 2018 Third Agreement that the existing pipelines could continue to operate until replaced by the pipeline for which approval is sought in this proceeding. In opposing the replacement of the existing pipelines, the Attorney General is in effect supporting indefinite operation of those pipelines, contrary to her own stated goal of terminating that operation and also contrary to the Legislature’s purpose in enacting Act 359 and the Agreements entered by the State in 2018 providing for the replacement of the existing pipelines. The core question at issue in this proceeding is whether to locate the replacement pipe segment in a tunnel to provide additional protection to the Great Lakes, consistent with the State’s established public policy as reflected in Act 359 and the Agreements entered by the State. The question is not whether Line 5 should continue to operate or not, which is an entirely different question that the Attorney General is already litigating elsewhere. Further, the Attorney General’s climate agenda is wholly unrelated to this proceeding and should not obstruct the Legislature’s policy efforts to protect the Great Lakes.

C. THE ATTORNEY GENERAL’S INTERVENTION MUST BE LIMITED

Rule 412(1) provides that an administrative law judge “shall grant or deny, in whole or in part, a petition for leave to intervene **or, if appropriate, may authorize limited participation.**” R 792.10412(1); Emphasis added. For the reasons set forth above, the Attorney General’s intervention should be limited to the issues actually raised by Enbridge’s application and which this Commission has jurisdiction to decide: whether (1) the applicant has demonstrated a public need for the proposed Project, (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,

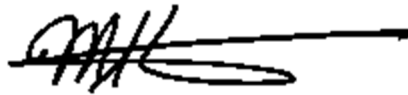
Order, p. 5. The Attorney General should not be allowed to raise issues regarding continued operation of the existing Line 5 pipelines across the Straits or broader issues of climate change that are not at issue here.

III. RELIEF REQUESTED

WHEREFORE, Enbridge Energy, Limited Partnership, respectfully requests that:

- A. The Attorney General's intervention be limited to the relevant issues in this Act 16 proceeding which are: (1) is there a public need for the Project, (2) is the replacement pipe segment designed and routed in a reasonable manner, and (3) will the construction of the replacement pipe segment meet or exceed current safety and engineering standards; and
- B. The Attorney General be prohibited from raising issues regarding the construction of the tunnel, the continued operation of Line 5, and climate change.

Respectfully submitted,



Dated: August 11, 2020

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