

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, 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

U-20763

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**PETITION TO INTERVENE BY  
THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI**

1. The Nottawaseppi Huron Band of the Potawatomi (NHBP) seeks to intervene in this case under Rule 410 of the Commissions Rule of Practice Procedure, R 792.10410, to represent the interests of its members in protecting and preserving natural resources from the risk of harm anticipated by the Enbridge Energy, Limited Partnership (Enbridge) project.

2. NHBP is a federally recognized sovereign Indian tribal nation with a seven-county service area (Allegan, Barry, Branch, Calhoun, Kalamazoo, Kent and Ottawa Counties) located in Michigan with over 1,400 enrolled Tribal Members.

3. NHBP and its members consistently maintain their culture and way of life through utilizing the natural resources at issue in Enbridge's application for approval of its Line 5 replacement project. The tribe and its members have a strong, vested interest in protecting themselves, their way of life and Michigan's natural resources from harm caused by Enbridge's proposed project. Accordingly, NHBP and its members will be directly affected by the Commission's decision in this matter.

4. Enbridge is seeking the Commission's approval in the form of a grant of authority under Public Act 16 of 1929, MCL 483.1 *et seq.* (Act 16) and Rule 447 of the Commissions Rule of Practice and

Procedure, R 792.10447, to construct, as it characterizes it, a replacement segment of its Line 5 pipeline that crosses the Straits of Mackinac. In the alternative, Enbridge requests a declaratory "ruling confirming that it already has the requisite authority from the Commission to construct the replacement segment of Line 5 that is the subject of this application."<sup>1</sup> (Application, P. 1.)

5. 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, Page 5.

6. NHBP and its members have the potential to be harmed if Line 5 continues to operate in Straits of Mackinac, even if it is moved into a tunnel as Enbridge proposes. Specifically, NHBP and its members face a daily risk of harm from the release of oil and/or natural gas liquid into the streets from existing aged underwater pipes. This risk will be immeasurably prolonged if Enbridge waits until the tunnel is built and operational to decommission the underwater pipes. NHBP and its members are further exposed to the impacts of the project, especially in light of those continued project whims as described in the Application of this case. Further, NHBP and its members vehemently disagree with Enbridge's claim that "locating the pipe line in the tunnel virtually eliminates the already very small risk of release from Line 5 impacting the streets." (Applicant, p. 12.) NHBP and its members 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. If the Commission extended the life of Line 5 by approving Enbridge's proposed replacement, NHBP, its members and Michigan's environmental and natural resources would face the risk described in this paragraph 6 for much longer than they would otherwise.

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<sup>1</sup> On June 30, 2020 MPSC Granted Enbridge's request for a declaratory ruling, but denied the relief requested, finding that Enbridge was required to proceed as a contested case under an application seeking authority for new construction associated with Line 5. On July 29, 2020, Enbridge filed a Petition for Rehearing on its request to proceed without requiring it to file an application seeking approval for its project.

7. The Michigan Public Serve 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 for example *Association of Date Processing Service Organizations, Inc. v. Kamp*, 397 U.S. 150; 98S CT 827; 250 L ED 184 (1970).
  - b. Second permissive intervention, where the Commission has the discretion to permit a party to intervene in a case where that party can provide useful information to the Commission or a unique prospective 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, 2020, order, p. 7 (*In re Detroit Edison*).

Though no reminder may be needed, Michigan reached the ten-year anniversary of the largest inland oil spill in North American history: the Kalamazoo River Spill, July 25th 2010. Final remediations are still occurring along stretches of the River from this spill, which inflicted more than \$1.5 billion dollars in damages to Michigan's environment. This spill directly affected natural and cultural resources used by the NHBP community, and serves as a benchmark for just how costly a modern spill can be; the dynamic Straits environment would be much costlier and harder to contain. The Kalamazoo Spill should constitute a cautionary warning that the insurance requirements carried by Enbridge are insufficient, particularly those related to the Tunnel Agreement and Leases signed in 2018, in the event of improper pipeline design, maintenance, or some unforeseen geologic event resulting in a worst-case release.

8. NHBP meets both these tests.

9. As described above, NHBP members face prolonged risk of environmental harm, which threatens their culturally significant way of life, caused by the continued operation of Line 5 and by the project as described above.

10. NHBP and its members are within the zone of interests protected by Act 16. These statutes authorize the Commission to "to control, investigate, and regulate" oil pipeline operators within the state. MCL 483.3. As evidenced by Enbridge's submission of an Environmental Impact Report and alternatives analysis and its Application, the Commission may, and does, consider environmental impacts like the one that would adversely impact NHBP's members when considering Act 16 approvals. Act 16 also requires a pipeline company to "make a good-faith effort to minimize the physical impact and economic damage that result from construction and repair of a pipeline." MCL 483.2B. Finally, as noted above, the Commission interpreted Act 16 to require a demonstration of public need for the proposed project; that it is designed and routed in a reasonable manner; and that the construction of the project will meet or exceed current safety and engineering standards – all of which are in substantial question in this case. In sum, Act 16 provides an avenue for the Commission to address the needs for, design and routing of, and potential environmental harms from patrolling transport projects; and, therefore, the statute protects the interests of NHBP's members.

11. NHBP and its members are also within the zone of interest protected by the Michigan Environmental Protection Act (MEPA) (MCL 324.1701 et seq.). MEPA § 1705(1) authorizes the agency or court to permit any person to intervene in an administrative proceeding "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." MCL 324.1705(1). Moreover, NHBP's vested interest in the natural resources provide an independent basis for a MEPA claim.

12. The Commission recently held in DTE Electric Company's Section 6t Integrated Resource Plan case that MEPA applies to Commission proceedings:

The Commission finds that MEPA does apply to this proceeding, because the allegation of impairment has been made by intervenors. The Commission concludes that it is appropriate to determine under MEPA: (1) whether the IRP would impair the environment; (2) whether there was a feasible and prudent alternative to the impairment; and, (3) whether the impairment is consistent with the promotion of the public health,

safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.<sup>2</sup>

The Commission also noted that it applied MEPA and DTE's Certificate of Necessity case. *Id* at p. 43, n. 5. Because NHBP alleges, and intends to submit testimony demonstrating, that Enbridge's Application will likely pollute, impair or destroy natural resources in the public trust therein, the Commission should grant NHBP leave to intervene by right to advocate for consideration of environmental impacts and potential alternatives in this case.

13. NHBP has organizational standing because its individual members meet the zone of interest test. Commission rules and precedent provide that an association may be granted intervention to represent the interest of its members. 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); See also *Drake v. Detroit Edison*, 453 F Sup 1123, 1129 (WD Mich 1978) (Noting that a “plaintiff may be granted standing when he asserts interest not of his own but of a third party that meet the zone of interest test.”). To establish standing to intervene in a Commission proceeding, an association can assert and represent the interests of its third-party members without specifically identifying each member whose interests are to be represented. *In re Edison* at 8.

14. NHBP also meets the test for permission intervention because NHBP will provide useful information to the Commission and a unique perspective on the issues.

15. NHBP plans to evaluate Enbridge's application, testimony, and exhibits; and to conduct discovery; and then to raise related issues and take those positions which best serve the interests above. Among other things, NHBP plans to contest as unfounded and unwarranted Enbridge's request for rehearing on its declaratory judgment request that its project does not require Commission's approval. NHBP also plans to challenge the public need for the proposed project. NHBP intends on scrutinizing and potentially challenging whether the project is designed and routed in a reasonable manner, and whether

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<sup>22</sup> *In the matter of the application of DTE Electric Company for approval of its Integrated Resources Plan pursuant to MCL 460.6t and for other relief*, Case No. U-20471, February 20, 2020, Order, p. 43.

the construction of the project will meet or exceed current safety and engineering standards. NHBP also contemplates raising appropriate issues under MEPA, as described above. NHBP reserves the right to advance other issues as the case develops.

16. This petition to intervene is timely.

17. NHBP requests that all notices and pleadings be served on:

John Swimmer  
[john.swimmer@nhbp-nsn.gov](mailto:john.swimmer@nhbp-nsn.gov)

and on:

Amy L. Wesaw  
[amy.wesaw@nhbp-nsn.gov](mailto:amy.wesaw@nhbp-nsn.gov)

For the reasons outlined above, NHBP respectfully requests the Commission grant its petition to intervene and treat it as a party to this proceeding.

Date: July 22, 2020

NHBP Legal Department

By:

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