

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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Application of Enbridge Energy, Limited)
Partnership for the 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

RULING ON MOTION IN LIMINE ON REMAND

1. Procedural History

On December 9, 2020, the Commission entered an Order (Order of Remand) on a Motion *in Limine* filed by Enbridge Energy, Limited Partnership (Enbridge) directing rehearing on the Motion, and reconsideration of the October 23, 2020, Ruling on the Motion (Initial Ruling). The Order of Remand is in response to a Notice of Revocation and Termination of Easement (Notice) issued by the Governor and Director of the Department of Natural Resources to Enbridge on November 13, 2020. The Notice requires Enbridge to cease operations of the dual pipelines located on the bottomlands of the Straits of Mackinac in 180 days and decommission the pipelines under a plan submitted and approved by the State. Case No. U-20763, December 9, 2020, Order, pg. 4, fn. 1. The Order of Remand directed the schedule in this case be revised to provide “the parties the opportunity to brief the question of whether, and, if so, to what extent

Governor Whitmer’s action to revoke and terminate the 1953 easement changes the scope of review in this proceeding and how that change, if any, effects the issues presented in the motion in limine, including the issues of public need for the Line 5 Project and the required environmental review of the Line 5 Project.” Id., pg. 6.

Consistent with the Order of Remand, and under a schedule agreed to by the Parties, except where noted Briefs on Remand and Reply Briefs were filed by: Enbridge; Michigan Environmental Council, Grand Traverse Band of Ottawa and Chippewa Indians, Tip of the Mitt Watershed Council, National Wildlife Federation, Bay Mills Indian Community, and Nottawaseppi Huron Band of the Potawatomi (Joint Response¹); Environmental Law & Policy Center and Michigan Climate Action Network (ELPC); Mackinac Straits Corridor Authority (Authority) (Initial Brief only); For Love of Water (FLOW) (Initial Brief only); Michigan Propane Gas Association and the National Propane Gas Association (Associations); the Michigan Laborers’ District Council (Council) (Reply Brief only); the Attorney General; and Commission Staff. Oral Argument on the Motion was held on February 3, 2021.

2. Notice of Revocation and Termination of Easement and Order of Remand

Under the Order of Remand, consideration of the Notice must be made relative to Enbridge’s Motion in *Limine*, where it sought:

¹ The September 23, 2020, Brief in Response to the Motion was filed collectively by five of these parties and the Initial Ruling identified them and the filing as the “Joint Response”. The Briefs on Remand was also filed those parties along with the Nottawaseppi Huron Band of the Potawatomi. For consistency with the initial Ruling, the filings of these six parties will continue to be identified collectively as the Joint Response.

[A] ruling that essentially sets the scope of hearing in two regards. First, it seeks to exclude as legally irrelevant any evidence on the following issues:

(1) the construction of the utility tunnel; (2) the environmental impact of the tunnel construction; (3) the public need for and continued operation of Line 5; (4) the current operational safety of Line 5; (5) whether Line 5 has an adverse impact on climate change; and (6) the intervening parties' climate change agendas. Motion, pgs. 1-2.

Second, it seeks a ruling that limits the evidence to the following issues:

(A) is there a public need to replace the existing Line 5 crossing of the Straits with a pipe segment relocated in a utility tunnel beneath the Straits; (B) is the replacement pipe segment designed and routed in a reasonable manner; and (C) will the construction of the replacement pipe segment meet or exceed current safety and engineering standards[.]
Id., pg. 2.²

The Initial Ruling held the construction and operational aspects of the relocated pipeline, including the Utility Tunnel, were proper considerations in reviewing the Application under Public Act 16 of 1929 (Act 16) and the administrative rules promulgated under its authority. MCL 483.1, *et seq.* The Initial Ruling also held the review of the Application concerning the public need under Act 16 and environmental impacts under the Michigan Environmental Act (MEPA), MCL 324.1701, *et seq.*, were properly limited to the proposal to relocate the existing dual pipelines located on the bottomlands to the proposed Utility Tunnel. In so doing, the Initial Ruling rejected the arguments of the Parties opposing the Motion that the public need inquiry should include the entirety of Line 5 located in Michigan, and the MEPA analysis consider the environmental impacts

² Case No. U-20763, October 23, 2020, Ruling, pgs. 2-3.

of the consumption of the petroleum products, particularly greenhouse gas (GHG) emissions, transported on Line 5. Appeals were taken on the last two issues, and while they were pending before the Commission the Notice was issued. The Order of Remand did not reach the merits of the Appeals, but rather directed rehearing and reconsideration of the scope of the Act 16 and MEPA inquiry relative to the Notice.³

The Notice is the State of Michigan advising Enbridge of its intent to revoke and terminate the easement under which the dual pipelines located on Great Lakes bottomlands in the Straits of Mackinac were sited and operated since 1953. The Notice has, predictably, resulted in litigation. Contemporaneous with the issuance of the Notice, the State filed suit “in the Ingham County Circuit Court on behalf of the State of Michigan, Governor Whitmer, and the DNR, seeking declaratory and injunctive relief to acknowledge and enforce the revocation (Case No. 20-646-CE). [footnote omitted]. On November 24, 2020, Enbridge filed an action against the State of Michigan in the U.S. District Court for the Western District of Michigan for declaratory and injunctive relief seeking a determination that the revocation is not lawful (Case No. 20-CV-01141).” Order of Remand, pgs. 4-5. As of the Oral Argument, the state case has been transferred to federal court and motions will soon be filed. 5 TR 333.

³ No appeal was taken of the Initial Ruling’s holding concerning the Utility Tunnel and after it was entered Enbridge filed, at Staff’s request, supplemental testimony and exhibits concerning the design, construction, and operational aspects of that feature. See Dkt. #0509 & 0531. Accordingly, that issue will not be revisited except to note that Enbridge maintains its right to appeal that holding in the future under R 792.10433(5). See Initial Brief on Remand, pg. 9, fn. 3. In addition, any arguments raised in the Initial Briefs on the Motion and Appeals, and raised again in the Briefs on remand, that are outside the scope of the Order of Remand are preserved and will not be addressed in this Ruling. Finally, while all of the arguments raised by the Parties have been considered, this Ruling only addresses those necessary to reach and decide the issues raised in the Order of Remand.

3. Positions of the Parties

As set forth below, the Parties diverge on the significance of both the Notice and litigation on the scope of this case. Enbridge, the Associations, the Council, the Authority, and Staff argue the Notice cannot expand the Commission's jurisdiction under Act 16 and MEPA, and the holding in the Initial Ruling on the scope of this case is proper. Further, these Parties contend the litigation concerning the Notice is in its early stages and will likely take years before the issue is decided and appeals are exhausted. Conversely, the Joint Response, ELPC, FLOW, and the Attorney General argue the Notice requires Enbridge to cease operation of the dual pipelines on May 13, 2021, and thus effectively serves to decommission Line 5 in Michigan.⁴ This, in turn, requires the scope of the case be expanded from the holding in the Initial Ruling that the proper inquiry under Act 16 and MEPA was the proposal to relocate the dual pipelines from the bottomlands to a Utility Tunnel and the attendant environmental effects. These Parties contend the Notice necessarily requires the scope of the case include a determination of whether a public need exists for Line 5, consideration of the safety and operational aspects of Line 5, and development of a record of the environmental effects of the petroleum products transported on Line 5. To these Parties, the litigation is of no moment, and as of May 13, 2021, the dual pipelines can no longer legally transport petroleum products and Line 5 will be decommissioned.

⁴ The 180th day after the issuance of the Notice is identified by the Parties as both May 12 and May 13. Under the method for counting days in a statute or rule, the first day is excluded and the last day is included, 180 days after November 13, 2020, is May 13, 2021. See MCL 8.6. That date will be used in this Ruling.

As indicated, Enbridge argues the Notice is not a basis to expand the Commission's jurisdiction under Act 16 or MEPA. In support, Enbridge contends the Notice is not-self executing as evidenced by the contemporaneous lawsuit the State filed to enforce its terms. That suit, along with the suit Enbridge filed, will ultimately determine if the dual pipelines will be decommissioned and until that time Enbridge intends to continue to operate the dual pipelines under the terms of the easement and the requirements of federal law. Enbridge also takes issue with the reference in the Order of Remand that the continued operation of Line 5 and lifespan of the system is central to its case and are now called into question by the Notice. Enbridge argues that it has been clear in its filings that consistent with the applicable law and its 2018 Agreements with the State, which the Notice acknowledges, its intent has always been to operate Line 5, including the dual pipelines, until the Utility Tunnel is operational and that portion of the pipeline can be relocated and decommissioned. To Enbridge, the lifespan of Line 5, and the effect of the Notice on it, are not relevant considerations when considering its Application under Act 16.

Enbridge next argues Line 5 was approved by the Commission in 1953 and deemed "for a public use benefiting the people of the State of Michigan." *Lakehead Pipeline v Dehn*, 340 Mich 25, 37-42; 64 NW2d 903 (1954). Enbridge notes the Notice does not expressly challenge that approval, nor could it without first affording the procedural steps required under the Administrative Procedures Act (APA). MCL 24.205(a) & 24.292(1); *Rogers v Michigan State Bd of Cosmetology*, 68 Mich App 751; 244 NW2d 20 (1976).

Regarding MEPA, Enbridge contends the Notice does not change the holding in the Initial Ruling that under case law and Commission precedent the examination is on the environmental effects of the activity proposed in the Application. Therefore, the Notice is not a basis to extend that examination to an assessment of the environmental effects of Line 5 or the consumption of the oil transported on the system.

Similar to Enbridge, the Associations contend the Notice does not change the scope of this case as set forth in the Initial Ruling under Act 16 or MEPA. As to Act 16, the Associations note the Notice is not self-executing based on the State's lawsuit, and unless and until a judicial determination is rendered to the contrary Line 5 will continue to operate under the Commission's 1953 approval. Further, the Notice involves a dispute over the easement that allowed the siting and construction of the dual pipelines on the bottomlands, and as such can have no effect on the determination of a public need for Line 5 in that 1953 approval, or the similar determination embodied in Act 359 and the 2018 Agreements. The Notice does not challenge the continued operation of Line 5 and was issued with the knowledge of the on-going effort to obtain regulatory approval to relocate the dual pipelines into the Utility Tunnel.⁵ Therefore, the Associations argue the Notice has no effect on the scope of this case, which is properly limited under Act 16 to the proposal to locate the dual pipelines to the Utility Tunnel. Similarly, the Notice cannot provide a basis to expand the conduct under MEPA to include a review of the environmental impacts of the petroleum products transported on Line 5.

⁵ The Associations note the State's press release regarding the Notice indicated it had no effect on the on-going regulatory review of the Utility Tunnel. Initial Brief, pg. 8, fn. 9.

Irrespective of the Notice, the Associations contend the conduct subject to MEPA remains the activity proposed in the Application and over which the Commission has jurisdiction: the relocation of the dual pipelines into the Utility Tunnel. To expand the conduct in the manner sought by the Parties opposing the Motion to the entirety of Line 5, or the effects of the petroleum products transported on it, is legally deficient under Michigan jurisprudence. See *Preserve the Dunes, Inc., v Dep't of Env'tl Quality*, 417 Mich 508, 517; 684 NW2d 847 (2004).

Staff contends that the Notice should not be considered because the ultimate decision in the pending lawsuits on the validity of the easement will not be made in the foreseeable future. Until that decision is made, Staff argues it would be improper to consider whether Line 5 will continue to operate, just as it would be improper to rely on a 2019 suit filed by the Attorney General that sought to decommission Line 5. If the Notice is considered, Staff argues on two points it does not provide a basis to expand the scope of this case to include consideration of the public need of Line 5. First, the Notice does not reach the 2018 Agreements between the State and Enbridge to construct a Utility Tunnel for the purpose of relocating the dual pipelines. Therefore, even if the Notice is given effect and the dual pipelines cease operation on May 13, 2021, the review of the proposal to relocate that segment of Line 5 into the Utility Tunnel under Act 16 will continue. Second, the Notice does not change Commission precedent that the scope of an Act 16 case involving a segment of an existing pipeline does not allow reconsideration of the public need determination of the entire pipeline system. See Case No. U-13225, July 23, 2002 Order; See also Initial Ruling, pg. 15, fn. 8.

Staff also argues that expanding the scope of this case based on the Notice to include consideration of the public need for Line 5 would be contrary to the notice provisions of the APA. Similar to Enbridge and the Associations, Staff also contends the Notice cannot serve to expand the Commission's review under MEPA, which is properly limited to the project under review, i.e. the conduct, and the Commission's jurisdiction over that activity. See Initial Ruling, pgs. 18-19.

The Joint Response maintains its argument that under Act 16 the determination of whether a public need exists for the project proposed in the Application necessarily entails a similar determination on the entirety of Line 5. As it pertains to the Notice, the central precept of its argument is the operational lifespan of Line 5 is now in doubt with the revocation of the easement, and the project must be viewed as a means to extend the system's lifespan. This, in turn, strengthens its argument that the scope of this case must include an examination of the safety and public need for Line 5, and diminishes Enbridge's position that the operational aspects of Line 5 are not implicated by the filing of the Application because irrespective of the Commission's decision it can continue to operate the system. Because the Notice effectively renders the operation of the system impossible without the project in this case, the Joint Response contends the issue of the public need for Line 5 is relevant.

The Joint Response argues extensively that Enbridge has introduced the operational aspects of Line 5, along with the proposition the system can operate indefinitely, in its Application and pre-filed testimony. The Joint Response argues this proffered testimony is cast into doubt by the Notice, and the other Parties have the right

to offer evidence about the need for the project and the continued operation of Line 5. See MCL 24.272(3). The Joint Response also argues the operational and safety deficiencies of the dual pipelines identified in the Notice raise similar issues about the integrity of Line 5 and the environmental risks, particularly to resources protected under tribal treaties, posed from its continued operation if the dual pipelines are relocated into the Utility Tunnel, and thus are relevant to the Act 16 review of the project.

The Joint Response argues the Notice requires a “broad and unrestricted” review of the project under MEPA because the conduct is now the continued operation of the pipeline based on the proposed relocation of the dual pipelines into the proposed Utility Tunnel. Under §1705(2) the scope of the MEPA inquiry necessarily entails an examination of the potential environmental harm from the operation of Line 5, such as an oil spill, relative to alternatives, such as operating the pipeline for a shorter duration or whether the transportation of oil across the Straits is necessary. The Joint Response also contends the question of the continued operation of Line 5 and treaty rights requires the Tribal Parties be allowed to present evidence concerning the potential environmental effects on those resources protected under those treaties. Finally, the Joint Response argues that because the Notice effectively makes this case about the future of Line 5, consideration of the environmental effects of greenhouse gas (GHG) emissions resulting from the consumption of oil it will transport if the project is approved is relevant under MEPA.

The ELPC argues that the Notice legally decommissions Line 5 on May 13, 2021, and as a result the scope of this case now entails a proposal to put into service a pipeline

that will transport oil. Thus, rather than a proposal to replace a segment of an existing pipeline system the effect of the Notice is to render the project as a proposal to restart what is in effect a new pipeline system. The ELPC claims the pending litigation is immaterial in this case because to consider it would require the Commission to make assumptions about the validity of the Notice. Rather, unless a court holds to the contrary, the Commission must treat the Notice as valid and enforceable and give effect to its revocation and termination of the easement, along with the authorization under which Line 5 currently operates, as of May 13, 2021.

Under Act 16 the Notice requires a review of the project that entails an examination of the entirety of Line 5, including the public need, and on this point the ELPC adopts and incorporates the Joint Response's analysis. Initial Brief, pg. 6, fn. 1. Under MEPA the ELPC argues the fact that the Notice effectively decommissions Line 5 as of May 13, 2021, requires an examination the environmental effects of increased oil supply and consumption, including GHG emissions, that would result from a project that restarts the system. The ELPC maintains its argument addressed in the Initial Ruling that case law supports a broad interpretation of the conduct subject to MEPA. Now it contends that interpretation should be utilized because the decommissioning of Line 5 under the Notice necessarily turns this case into a reexamination of whether the entire system should be restarted by relocating the dual pipelines into the Utility Tunnel.

FLOW's argument focuses on the public trust implications for both the easement for the dual pipelines and the Utility Tunnel. Regarding the latter, FLOW contends the easement conveyed through the 2018 Agreements did not make the requisite finding

regarding the public trust, and thus just as with the 1953 easement the conveyance is improper. Accordingly, FLOW argues Enbridge is precluded from receiving authorization under Act 16 and MEPA for the project and this case should be dismissed or held in abeyance until the public trust issues concerning the Utility Tunnel are resolved. Initial Brief, pgs. 5, 29. This argument fails for two reasons. First, this case does not entail the “approval” of the Utility Tunnel. See Initial Ruling, pg. 9. Second, Enbridge has been issued a permit for the Utility Tunnel by the Department of Environment, Great Lakes, and Energy (EGLE) under Part 325, Great Lakes Submerged Lands, of the NREPA, 1994 PA 451. MCL 324.32501, *et seq.* Dkt. #0574. A permit can only be issued under Part 325 upon a determination that the adverse effects to the public trust are minimal. R 322.1015(a). For the purposes of this case, that permit resolves any issue with the public trust. The remainder of FLOW’s arguments concerning the scope of this case under Act 16 and MEPA relative to the Notice are essentially the same as those offered in the first round of briefing of the Motion and remain pending before the Commission.

The Attorney General adopts the arguments of the Joint Response and ELPC concerning the proper scope of review under Act 16 and MEPA relative to the Notice. The Attorney General also takes issue with Enbridge’s argument that the Notice is not self-executing and has, standing alone, no practical effect. The Attorney General argues that under the Notice the presence and operation of the dual pipelines is unlawful as of May 13, 2021, and absent a court staying or enjoining its terms Enbridge is legally obligated to cease operations at that time. As a result of the presumptive effect that must be afforded the Notice, Enbridge’s argument that the public need for the project at issue

in this case is as an alternative to the continued operation of the dual pipelines is no longer valid.

4. Analysis

A. Act 16

The Motion *in Limine* raised the issue of whether the filing of the Application to relocate the portion of the pipeline system on the bottomlands into the Utility Tunnel required consideration of the public need, operational, and safety aspects of Line 5 in its entirety. Applying Commission precedent, the Initial Ruling held that under Act 16 the proper inquiry for a proposal involving a segment of an existing pipeline is on that segment, as opposed to the entire pipeline system. Case No. U-20763, October 23, 2020, Ruling, pg. 15. Therefore, any evidence concerning the entirety of Line 5 is irrelevant. *Id.*, pgs. 15-16. The holding remains before the Commission under the pending Appeals, but under the Order of Remand is to be reconsidered in light of the subsequent issuance of the Notice.

The Notice constitutes an official act of the State of Michigan to withdraw and revoke the 1953 easement granted by the Conservation Commission to Enbridge's predecessor that allowed the placement and operation of the dual pipelines portion of Line 5 on great lakes bottomlands.⁶ As the grantor, the State is well within its rights to deem the easement withdrawn and revoked, just as Enbridge, as the grantee, has the

⁶ Enbridge and Staff argue the Notice is inadmissible and thus cannot be considered. The fact the Commission based its Order of Remand on the Notice means it is on this record. MCL 24.276. Even if that were not the case, if offered the Notice is admissible as evidence a reasonable person would rely on in the conduct of their affairs given it was relied on in the Order of Remand. MCL 24.275.

right to dispute that action, with the ultimate determination of the validity of the easement made by a court of competent jurisdiction. It is reasonable to assume that prior to that date a judicial determination will be made on the status of the easement while the matter is litigated, particularly on the equities of enjoining the transportation of oil through the dual pipelines based on the Notice. However, the only definitive point is that as of May 13, 2021, the State will consider the easement withdrawn and revoked and Enbridge will consider the easement valid.⁷

Based on the foregoing, the Notice will be considered consistent with Commission precedent that in reviewing a project on a segment of a pipeline under Act 16 the focus is on that activity, as opposed to the entire previously approved pipeline. Initial Ruling, pgs. 14-16. Under that authority, the Notice is relevant in considering whether a public need exists for the proposal to relocate the dual pipelines into the Utility Tunnel. The question is whether the Notice serves to expand the review of the project proposed in the Application to allow for an examination to include the entirety of Line 5 under Act 16, particularly whether a public need exists for its continued operation.

The Parties seeking to expand the scope of this case to the entirety of Line 5 frame it in the context as being relevant to the review of the project proposed in the Application. For example, the Parties argue the project will extend the operational lifespan of Line 5, and if there is no public need for the entire pipeline or it is operated unsafely, the project

⁷ In a letter to the State dated January 12, 2021, Enbridge set forth the basis for rejecting the Notice and indicating its intent to continue to operate the dual pipelines until the Utility Tunnel is operational. Staff Initial Brief, Attachment A.

should not be authorized.⁸ That contention was briefed, argued, and addressed in the Initial Ruling, and will be ultimately decided by the Commission in the pending Appeals. Now these Parties contend the Notice also serves as a basis to expand the scope of the hearing to the entirety of Line 5. To accept these arguments requires a determination that the Notice effectively extinguishes the authority under which Line 5 operates, thereby allowing the public need to be revisited in this case. The viability of that contention turns on the nature of that authority.

As noted by Enbridge, Staff, and the Associations, the 1953 Order was issued under Act 16 and authorized the construction, operation, and maintenance of Line 5. March 31, 1953, Order in Case No. D-3903-53.1, pg. 9, at U-20763, Exhibit A-3, Dkt. #003.⁹ That Order was issued under the authority of Act 16, and held the pipeline meets a public need and serves a public interest. *Id.*, pgs. 7-10; See also Concurring Opinion, pgs. 1-2. In a separate proceeding involving condemnation for the pipeline, but implicating the Line 5 public need determination, the Supreme Court “specifically noted that, in adopting Act 16, the Legislature ‘did not undertake to authorize condemnation proceedings other than for a public use benefitting the people of the State of Michigan. That was the basis for legislative action.’”

⁸ Staff is accurate that whether the project will expand the lifespan of Line 5 is speculative, and numerous factors will determine how long that system operates. Initial Remand Brief, pgs. 12-14. Beyond this, the lifespan argument disregards the fact that Operators are required to maintain pipelines under federal regulations, which requires periodic maintenance or improvements on segments of the system. *Id.* These projects will to some degree extend, as opposed to shorten, the operational lifespan of a pipeline. To accept the Parties contention that under Act 16 any project that extends the lifespan of a pipeline somehow extinguishes the existing approval to the point that requires a reexamination of the entire pipeline is untenable.

⁹ “[Lakehead] has complied in all respects with the procedure specified by PA 1929, No. 16. It sought and obtained the approval of the commission for its proposed pipeline across the State.” *Lakehead Pipeline*, 340 Mich at 41.

Case No. U-12344, March 7, 2001, Commission Order, pg. 13, citing *Lakehead Pipeline*, 340 Mich at 37. Accordingly, the 1953 Order issued under Act 16 establishes that Line 5 serves a public need and is in the public interest. Further, since neither are provided for under Act 16, the 1953 Order does not have an expiration date or require renewal, so the authority to operate Line 5 under its authority remains in effect today.

To revisit that authorization based on the Notice implicates fundamental administrative law principles because the authority to operate Line 5 under the 1953 Order is a license under Administrative Procedures Act (APA). MCL 24.205(a).¹⁰ Certain steps are required before an agency begins “proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license...” MCL 24.292(1). First, the “agency shall give notice...to the licensee of facts or conduct which warrant the intended action.” *Id.* Next, “the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license...” through what is termed a Rogers hearing. *Id.*; *Rogers, supra*. If the matter remains unresolved, the final step is the issuance of a second notice of hearing that commences the contested case where the agency has the burden to prove the conduct it alleges warrant the §92(1) action on the license. *Rogers*, 68 Mich App at 754. None of these steps have or will be taken in this case, which is based on the Application for authorization under Act 16 to relocate the dual pipelines to the Utility Tunnel, as opposed to an agency initiated

¹⁰ “A license is permission by competent authority to do an act which, without such permission, would be illegal.” *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan*, 414 Mich 247, 272; 324 NW2d 851 (1982), quoting Bienenfeld, *Michigan Administrative Law* (Ann Arbor: Institute of Continuing Legal Education) pg. 7-1. .

proceeding where facts or conduct is alleged that requires revocation of the license issued in the 1953 Order.

The Parties opposing the Motion contend they are not seeking a revocation of the approval of Line 5, but only seek to litigate whether the public need determination is still viable in the context of the public need for the proposal to relocate the dual pipelines into the Utility Tunnel, and now under the terms of the Notice. See Initial Ruling, pg. 13; Joint Response, Reply Brief, pgs. 8-9; 5 TR 376-377. To be clear, these Parties have the right to offer relevant evidence concerning the public need for the activity proposed in the Application. However, the 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. Thus, the Parties opposing the Motion are effectively arguing the Notice extinguishes the existing authorization of Line 5 and requires an examination of the entire system under Act 16, including the public need. This argument cannot be sustained because the 1953 Order that authorized Line 5 under Act 16, including the determination it serves a public need and public purpose, remains in effect. The Commission, at its discretion, has the authority under Act 16 to commence a proceeding to revoke the license issued under the 1953 Order if it deems the Notice is a fact or gives rise to conduct that warrants that action under §92(1).¹¹ See MCL 483.3(1).

¹¹ The Joint Response's argument that the 1953 Order suffers the same flaw as the 1953 easement identified in the Notice, failure address the public trust upon issuance, also goes beyond the scope of this case. To revisit the validity of the license issued in the 1953 Order based on that assertion, or any other, implicates the §92(1) notice and hearing requirements.

But that step must be done under the notice and hearing provisions of the APA, and not in a case on an Application to replace a segment of a licensed pipeline.¹²

This leaves the issue of the effect of the Notice on the Motion in *Limine* as it pertains to the review of the project under Act 16. If, as the Attorney General argues, the Notice is given presumptive effect, and absent a court staying or enjoining its effect, then on May 13, 2021, Enbridge can be considered to no longer possess the right under the easement to maintain or operate the dual pipelines. However, that does not extinguish the right to operate Line 5 under the 1953 Order. If on or after May 13, 2021, the dual pipelines are in fact shut down, and as a result Line 5 is also shut down, the right to operate will, as a matter of law, remain in effect. In fact, as Enbridge and Staff note if the operation of Line 5 ceases for whatever reason, under Act 16 it can be restarted in the future under the existing license without first having to obtain Commission approval. See Enbridge Reply Brief, pg. 15; Staff Reply Brief, pgs. 2, 9; 5 TR 337-338, 400-401. While the practical effect of the Notice on Line 5 on May 13, 2021, is unknown, its legal effect does not extend to revoking the Act 16 license issued in the 1953 Order or nullifying the public need/public interest determination embodied in that license.

Based on the foregoing, to accept the Notice as requiring a reexamination of the public need of Line 5 under Act 16, along with its operational and safety aspects, would

¹² The Joint Response contends the §71 notice requirements under the APA are satisfied by the Notice of Hearing issued by the Executive Secretary (Dkt. #0140), and its Petition to Intervene provided notice that the continued public need for Line 5 was at issue in this case. Reply Brief, pgs. 27-29. However, the notice issued under §71 was for the contested case on the Application. If the validity of the existing license is at issue, the §71 process is initiated only after the §92(1) requirements, including the agency providing the licensee notice of the alleged facts or conduct that form the basis of the action, are satisfied. *Rogers*, 68 Mich App at 755-756.

result in a diminishment of its existing license under §92(1) of the APA without providing the procedural due process protections afforded a licensee. Accordingly, the Notice cannot be used to expand the scope of this case to include an examination or determination of the public need for Line 5, or any aspect of its operation and safety. Rather, the Notice can only be considered in the context of the Act 16 criteria as applied to the proposal to relocate the dual pipelines from the bottomlands to the proposed Utility Tunnel.

B. MEPA

The next issue is what, if any, effect the Notice has on the Commission's review of the Application under MEPA. MCL 324.1701, *et seq.* The scope of the review under MEPA is controlled by the text of the statute, case law and Commission precedent. See Initial Ruling, pgs. 16-19. Under that authority and consistent with the Commission's jurisdiction, the Initial Ruling held the conduct subject to review under MEPA is the proposal to relocate the dual pipelines into a Utility Tunnel. Concomitantly, the Initial Ruling granted the Motion as it pertained to the environmental effects of both the Line 5 system, and the extraction, refinement and ultimate consumption of the oil shipped on that system as being beyond the scope of the Commission's MEPA review.

The Parties opposing the Motion argue at great length that the Notice serves to expand the MEPA review to the entirety of Line 5 and the effects of the oil transported on the system. For the most part, those arguments and supporting legal authority are the same that were raised in the first briefing of the Motion and considered in the Initial Ruling.

As it pertains to the specific issue in the Order of Remand, the Notice will be considered in determining the scope of the MEPA review in this case.

As noted, the Notice constitutes the State advising Enbridge the easement under which the dual pipelines were sited and operate is revoked and terminated as of May 13, 2021. The Notice does not change the activity proposed in the Application, i.e., the conduct as that term is used in MEPA, the Commission's jurisdiction over that proposal, or the legal authority underlying the Initial Ruling's conclusion concerning the MEPA review.¹³ Specifically, as set forth under the Act 16 analysis, the Notice also does not change the authority under which Line 5 operates, and thus the operation and safety of that system is outside the conduct subject to review under MEPA. Further, the Notice does not provide the substantive legal basis in Michigan law the Initial Ruling found lacking to expand the MEPA review to the environmental effects of the extraction, refinement and ultimate consumption of the oil shipped on Line 5. Under MEPA, the focus is on the conduct under agency review and the statutory authority underlying that review. Initial Ruling, pgs. 18-19. For these reasons, the Notice does not change the scope of the Commission's MEPA review of the project at issue in this case as set forth in the Initial Ruling.

¹³ In support of their respective arguments concerning the scope of the conduct under MEPA, the Parties rely on *Preserve the Dunes, supra*. While *Preserve the Dunes* involved an original circuit action seeking declaratory and other equitable relief under §1701, as opposed to an agency licensing matter under §1705, the focus was on the environmental effects of the conduct of the Defendants: the DEQ's issuance of a permit under the Sand Dune Mining Act, MCL 324.63701, *et seq.*, and Technisand Inc.'s mining operation under that permit. Therefore, *Preserve the Dunes* supports the proposition that under MEPA the conduct is the proposal to relocate the dual pipelines to the proposed Utility Tunnel.

5. Conclusion

Based on the foregoing, in 1953 the Commission issued an Act 16 license that authorized the construction, operation, and maintenance of Line 5. That license remains in effect and can only be subject to the actions listed in §92(1) of the APA after the notice and hearing provisions of the APA are satisfied. Accordingly, neither the filing of the Application at issue in this case, nor the State's Notice that the easement under which the dual pipelines were sited and operate is revoked and terminated as of May 13, 2021, allows for a reexamination of the public need for Line 5, or its operational and safety aspects, under Act 16. Rather, the Notice is relevant under the proper Act 16 review of the project: whether a public need exists to replace the existing dual pipelines on Great Lakes bottomlands in the Straits of Mackinac with a single pipeline in a proposed Utility Tunnel.

The Commission's jurisdiction under Act 16 is over the proposal to relocate the existing pipelines into the Utility Tunnel, and a component of that jurisdiction is examining the environmental impacts of that conduct, consistent with the judicial and Commission construction of that term, under MEPA. The issuance of the Notice does not expand the MEPA inquiry to include the environmental effects of the operation and safety of Line 5, or those arising from the production, refinement, and consumption of the oil transported on Line 5.

Upon the reconsideration required in the Order of Remand, the Motion in *Limine* is granted in part, and denied in part, consistent with this Ruling and the October 23, 2020, Ruling.

MICHIGAN OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Dennis W. Mack
Administrative Law Judge

February 23, 2021
Lansing, Michigan