

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

FOR LOVE OF WATER,

Court of Appeal No. 369163

Appellant,

MPSC Case No. U-20763

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

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BRIEF OF APPELLANT FOR LOVE OF WATER (FLOW)

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JURISDICTIONAL STATEMENT

On December 1, 2023, the Michigan Public Service Commission (“MPSC” or “Commission”) issued an Order in MPSC Case Number 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, For Love of Water (“FLOW”) 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 Bay Mills Indian Community (“Bay Mills”), 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”), 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, sec 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), and MCL 324.1705(2). For Love of Water (FLOW) filed its Claim of Appeal within 30 days of the Commission’s Order, as provided for by statute.

STATEMENT OF QUESTIONS PRESENTED

- A. Did the Commission's December 1, 2023 and April 21 Orders that confined consideration of alternatives to the Straits segment of the Line 5 pipeline violate the Commission's mandatory duty under the Michigan Environmental Protection Act, MCL 324.1701 et seq., to comprehensively determine whether there exist feasible and prudent alternatives to Line 5 that would avoid its finding that the Enbridge Tunnel Pipeline Project is likely impairment of the environment to Line 5?

Appellee Commission Answered, "No."

Appellee Enbridge would Answer, "No."

Appellant FLOW Answers, "Yes."

- B. Did the Commission Fail to Properly Consider the Larger "Public Need" in 2023 that Is Required under Act 16, MCL 483.1(2), for the Tunnel Project Beyond the Mere Need for a New Tunnel and Pipeline Narrowly Limited to the Straits of Mackinac Segment of Line 5?

Appellee Commission Answered, "No."

Appellee Enbridge would Answer, "No."

Appellant FLOW Answers, "Yes."

INTRODUCTION

Enbridge’s Line 5, formerly Lakehead, is a 71-year old crude oil and natural gas liquid pipeline that runs 645 miles from Michigan’s Wisconsin border, across the Upper Peninsula, crosses the Straits of Mackinac west of the Mackinac Bridge, and then down through the Lower Peninsula to Sarnia, Ontario. The linchpin of Line 5 is the Straits of Mackinac because the pipeline crosses the public trust bottomlands and waters of the State of Michigan. There is no Line 5 without the State’s conveyance of an easement or lease to occupy the trust bottomlands and waters section.¹ The Straits section and Line 5 are interdependent and inseparable. A decision on one part affects the other.

In 1953, the State Department of Conservation leased the State’s trust bottomlands and the Commission issued an order approving the siting, construction, and operation of Line 5 in the Straits to interconnect with all Line 5. Because the entire Line 5 and Straits of Mackinac section of the Line are inseparable, the Appellee Public Service Commission’s (“Commission”) December 2023 final Order, approving the new, expanded, and extended operating life of Line 5, necessarily required consideration of whether or not there is a “public need” under Act 16, MCL 483.1(2), and whether there is a “feasible and prudent alternative” under Section 1705(2) of the Michigan Environmental Protection Act (“MEPA”)² on Line 5 as a whole. The public needs and circumstances in 1953 are vastly different than the critical needs and public interests of the State and its citizens today—seventy-one years later: These include the paramount public concern for the State’s air, water, natural resources,³ public health,⁴ energy, the serious damages due to climate

¹ Great Lakes Submerged Lands Act of 1955, MCL 32432502-32508; *Glass v Goeckel*, 262 Mich App 29; 683 NW2d 719 (2004).

² MCL 324.1705(2).

³ Mich Const 1963, art. 4, sec. 52; Mich Const. 1963, art. 4, sec. 51.

⁴ MEPA, MCL 324.1701 et seq.

change, and the recent laws enacted by the Legislature to reduce greenhouse gases, shift and expand clean energy, promote conservation, and spurn new economic growth.⁵ The major overall of Line 5 by Enbridge through a series of agreements with the State in 2017 and 2018 to foster the Tunnel Project in the Straits will have far reaching effects and implications on these larger paramount interests and public needs related to the enormous Tunnel Project for Enbridge and, according to a lease-back of the Tunnel to Enbridge, to transport fossil fuels in Line 5 for at least another 99 years.

When the Appellee Commission scheduled the contested case now on appeal before this Court, it stated that a “*new... single pipeline to be located within a new... tunnel*” involved “complex legal and policy issues and serious potential environmental risks.”⁶ But when the Commission considered the Tunnel Project and issued its final order in this case it did just the opposite: The Commission narrowed its review and excluded evidence outside of the tunnel pipeline in the Straits segment. In doing so, the Commission truncated its legal obligations to review and consider and determine public need and alternatives inherent in both the Straits and outside of the Straits.

Argument II, B. below shows that the Commission’s final Order on December 1, 2023 violated the constitutionally-backed mandate of the MEPA that prohibits conduct this is likely to pollute or impair if there is a feasible and prudent alternative, and the requirement that it must comprehensively examine in earnest the range of alternatives to Line 5 as a whole; its failure to do so was contrary to Section 1705(2) of MEPA and MEPA’s common law of environmental quality.

⁵ *E.g.*, PA 341 and 342 of 2016; PA 295 of 2008; PA 233 of 2023; PA 235 of 2023.

⁶ U-20763-0133, June 30, 2020 Order, p. 70. [FLOW Appendix 1]

Argument II, C., shows that the Commission’s decision confinement of its review of “public need” to only the Straits tunnel pipeline failed to consider the vastly different and larger public needs and declared and legally protected paramount interests facing the State and public today, rather than the needs addressed by an expedient decision by the Commission in 1953 that allowed Enbridge’s to take the shortest route to transport petroleum products through the Upper Peninsula, across the Straits, and down through lower Michigan and for the greater part back into Canada.

Arguments II., B. and II, C. also show that it was clear error and otherwise an abuse of discretion and manifest injustice for the Commission to exclude evidence on its consideration of the larger “public need” under Act 16 and its determination regarding feasible and prudent alternatives under MEPA, confining the presentation of evidence by Appellants to only the tunnel pipeline in the Straits of Mackinac; this narrow limitation on the presentation of evidence was contrary to Act and the Appellants’ rights under MEPA, rules of evidence, and resulted in an abuse of discretion and manifest injustice.

For these reasons, Appellant FLOW submits that this Court should reverse the December 2023 final Order and remand the matter to the Commission to comply with MEPA and the full sweep of compelling demands and larger public needs beyond those confined to the Straits.

I. STATEMENT OF FACTS AND PROCEEDINGS

Except as otherwise stated in this Brief on Appeal, Appellant FLOW accepts the Appellee Commission’s History of Proceedings and Background set forth in its December 2023 Order, April 21, 2021, and other previous proceedings identified by the Commission in the Final Order.⁷

Further, except as otherwise stated below, Appellant FLOW adopts the Statement of Facts of

⁷ U-20763-0133, Order, June 30, 2020, (“June 2020 Order”); U-20763-0713, Order, April 21, 2021, (“April 2021 Order”) [FLOW Appendix 2]; U-20763-1257, Order, July 7, 2022, pp. 1-6 [FLOW Appendix 3].

Intervenors-Appellants Tribes Bay Mills, LTBB, GTB, NHBP, ELPC, and MEC Coalition (“Appellants”).

A. Nature of the Proceedings—The Application

On April 17, 2020, Enbridge filed an Application for the Commission’s approval of a tunnel with pipeline for the transport of crude oil and natural gas liquids (“Tunnel Project”) under the Straits of Mackinac (“Straits”) of Lake Michigan as required by 1929 PA 16 (“Act 16”); MCL 483.1 et seq. and Rule 447 of the Rules of Practice and Procedure, R 792.10447, and the MEPA, Part 17, NREPA, MCL 324.1701 et seq. The Application, as described by Enbridge, is for “the Authority to Replace and Relocate the segment of Line 5 pipeline crossing’ into a tunnel through State’s public trust bottomlands under the Straits of Mackinac.”⁸ Along with its Application, Enbridge sought an *ex parte* approval of the Tunnel Project, and, alternatively, a declaratory ruling that it already had the requisite authority from the Commission to construct the Tunnel Project, because it was only replacing the dual pipelines with the new pipeline in a tunnel that itself was not subject to Act 16.⁹ The Commission ordered a public comment period. The Appellants and hundreds of citizens submitted comments opposing Enbridge’s attempt to truncate the proceeding because the massive new tunnel and pipeline required a comprehensive review of the public need and paramount public interests in the environment under Michigan Constitution, Art. 4, Sec. 52, the MEPA, and the public trust doctrine.¹⁰ On June 30, 2020, the Commission issued an order, denying both *ex parte* approval of Enbridge’s application and its requested declaratory relief. The Commission found “there is nothing routine” about the Tunnel

⁸ U-20763-0001, Application, Filing 4/17/20. [FLOW Appendix 4] For the law of public trust bottomlands, see *Illinois Central Railroad v Illinois*, 146 U.S. 387; 13 S Ct 110 (1892); *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960), and Arguments, II, C, *infra*.

⁹ *Id.*, p. 16.

¹⁰ U-20763-0133, June 30, 2020 Order, pp. 17-22.

Project, that it was “a *new*... single pipeline to be located within a *new*... tunnel” and involved “complex legal and policy issues and serious potential environmental risks,” then ordered a contested proceeding.¹¹

B. The Contested Case

1. Enbridge Motion in Limine.

Undeterred, Enbridge filed a motion in limine that requested the Administrative Judge (“ALJ”) to limit the scope of the Act 16 proceeding, claiming that the construction of the tunnel, environmental impacts of construction, public need, design and safety, impacts on climate change were not subject to review or irrelevant.¹² Enbridge also claimed that the Commission’s Act 16 review should be confined to the Straits pipeline segment only.¹³ Appellants opposed and argued that the tunnel, public need, design and reasonable siting, and safety standards under Act 16 and impacts and alternatives to Line 5 under the MEPA were inseparable from the new Tunnel Project.¹⁴ On October 23, 2020, the ALJ segmented the Tunnel Project from its interconnection to Line 5 as a whole, ruling that the review under Act 16 was limited to the Straits and excluding any review or evidence to determine likely pollution or the existence of alternatives determinations required by the MEPA for the entire Line 5.¹⁵

On November 13, 2020, the Department of Natural Resources (“DNR”) served Enbridge with a Notice of Revocation and Termination that revoked and terminated the 1953 Line 5 dual

¹¹ *Id.*, p. 70.

¹² U-20763-0296, September 2, 2020, Motion in Limine, pp. 1-2 [FLOW Appendix 5].

¹³ *Id.*, p. 2.

¹⁴ *E.g.*, U-20763-0326, Appellant MEC-GTB et al. Response to Motion in Limine, Sept. 23, 2020, pp. 7-10, 27-32; U-20763-0330, FLOW Response to Motion in Limine, Sept. 23, 2020, pp. 6-10, 11-16; U-20763-0329, Appellant ELPC Opposition to Motion in Limine, Sept. 23, 2020; U-20763-0331, AG Nessel Response to Motion in Limine, Sept. 23, 2020.

¹⁵ U-20763-0396, Order on Motion in Limine, Oct. 23, 2020, pp. 19-20 [FLOW Appendix 6].

pipeline easement in the Straits¹⁶ because of the devastating risks and unacceptable magnitude of harm of the now 71-year old pipeline to the public trust waters and bottomlands of the State.¹⁷ The Commission remanded the appeal to the ALJ to consider the effect of the revocation.¹⁸ The ALJ decided that the Notice had no effect on the proceeding and affirmed his October 23 2020 decision that review of “public need” and effects under the MEPA “[do] not... include the environmental effects of [the entire Line 5]”.¹⁹

On April 21, 2021, the Commission granted Appellants leave to appeal²⁰ and granted in part and denied in part Enbridge’s motion.²¹ The Commission ruled that the project was subject to Act 16,²² but that “public need” and other requirements were confined to the Replacement Tunnel Project across the Straits and does “not extend to the remainder of the line 5 because it is ‘outside the scope of this case.’”²³ Based on its orders in other pipeline cases, the Commission confined review of “public need” under Act 16 to the tunnel and new pipeline to the Straits segment as described in the Application.²⁴ The Commission cited its 2013 Order that approved a segment of Enbridge’s replacement of Line 6b across southern Michigan from Indiana to Sarnia after the rupture and massive damage in 2010 to the Kalamazoo River, because in that case it “did not examine the remainder of Enbridge’s pipeline system.”²⁵ The Commission then found that it “has

¹⁶ The Notice states that “the State is revoking and terminating the 1953 Easement...” [FLOW Appendix 7].

¹⁷ Notice of Revocation and Termination and U-20763-0713, April 21, 2021, Order.

¹⁸ *Id.*, p. 6.

¹⁹ U-20763-0602, ALJ Feb. 23, 2021 Ruling, p. 21-22 [FLOW Appendix 8].

²⁰ U-20763-0713, April 2021 Order, p. 54.

²¹ *Id.*, pp. 71-72.

²² *Id.*, p. 55. The three-factors test under Act 16 is; (1) public need for the proposed pipeline, (2) designed and routed in a reasonable manner, and (3) the construction meets or exceed current safety standards.

²³ *Id.*, p.60.

²⁴ *Id.*, p. 60.

²⁵ *Id.*, p. 62.

never examined” any part of a pipeline that was outside the segment identified in the applicant’s project or the effect of the “lifespan of an existing pipeline within the pipeline system.”²⁶

Further, while the Commission ruled that it would determine likely pollution, impairment, or destruction of the Tunnel under section 1705(2) of the MEPA, MCL 324.1705(2),²⁷ it also ruled that the “MEPA review does not extend to the entirety of Line 5... outside of the proposed Replacement Project”²⁸ and excluded evidence as to the remaining interconnected Line 5 pipeline and its lifespan, such as the 99-year lease-back of the tunnel.²⁹ Turning to the issue on the Notice of Revocation and Termination, the Commission viewed it as simply a notice, not a revocation, and that the notice did not affect the proceedings under Act 16.³⁰ The Commission’s orders, narrowly limiting and segmenting the proceeding and evidence on “public need” under Act 16 and alternatives under section 1705(2) of the MEPA,³¹ foreclosed any earnest examination of the existence of alternatives to Line 5 in its entirety without the likely effects of the Tunnel Project.

2. The Hearing and Commission’s Final Order (December 1, 2023).

a. Determination of Likely Pollution, Impairment, or Destruction of air, water, natural resources, and public trust in those resources under MEPA.

The Commission found likely environmental impacts from construction of the Tunnel Project in the Straits segment. Impairments “included increased noise, dust/particulates, and light from construction, and impacts to surface water, local residents, flora, fauna, air quality,

²⁶ *Id.*, p. 62.

²⁷ *Id.*, pp. 55-57, 66-67.

²⁸ *Id.*, pp. 62-63, citing its previous Order, June 2020, p. 68.

²⁹ *Id.*, p. 70.

³⁰ *Id.*, p. 68.

³¹ U-20763-1257, Order, July 7, 2022. [FLOW Appendix 9]. The Commission also found that Tribal treaty-reserved fishing, hunting, and gathering rights do not expand its authority to address ownership and operational questions over the pipeline system in the Straits.

groundwater, surface soils, and vegetation,”³² constituting “environmental impairments contrary to [Section 1705(2)] MEPA.” MCL 324.1705(2).³³ The Commission also determined that greenhouse gases (GHGs) attributable to the continued transport of fossil fuels associated with the Tunnel Project would create pollution, impairment, or destruction of the air, water, natural resources or public trust in violation of Section 1705(2) of the MEPA.³⁴ Due to these findings, the Commission concluded that it “may not approve the action if there is a feasible and prudent alternatives.”³⁵

b. Review and Determination of “feasible and prudent alternatives” under Section 1705(2) of the MEPA, MCL 324.1705(2).

The Commission noted that the purpose of the Replacement Project is to “alleviate an environmental concern to the Great Lakes” posed by the dual pipelines,³⁶ But, it again, limited its review and excluded evidence on the required determinations of alternatives under the MEPA that were outside of the pipeline alternatives in the Straits:³⁷ “[T]he scope of this case is dictated by two factors: (1) the activity proposed in the application, namely replacement of the existing 4-

³² U-20763-1454, Order, Dec. 1, 2023, p.329 [FLOW Appendix 10].

³³ *Id.*, p. 329.

³⁴ *Id.*, p. 331 (“GHGs are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby polluting, impairing, and destroying natural resources.”).

³⁵ FLOW also adopts the Statement of Facts and expert testimony of Appellants Environmental Law and Policy Center and MICAN (“ELPC”) regarding likely effects of climate change due to greenhouse gases (CHGs). ELPC’s experts testified that the Tunnel Project will result in the emission of 27 million metric tons carbon dioxide equivalents (CO₂e) and that social cost of GHG emissions from the project would be at least \$41 billion. The testimony demonstrated that GHG gas emissions will exacerbate climate change effects that are already impairing Michigan’s air, water, and natural resources. Expert Dr Stanton testified that the consideration of a “no-pipeline” alternative should have been undertaken, and that shutting down the existing dual pipelines in the Straits without constructing the Tunnel Project is a reasonable and prudent alternative.³⁵ FLOW also adopts the Statement of Facts and testimony of the Appellant Tribes regarding the likely effects on water resources, habitat, fish, and fishing.

³⁶ U-20763-0001, Application, p. 1; and U-20763-1454, Dec. 2023 Order, p. 342.

³⁷ Statement of Facts and Proceedings, Section I, B. 1., *supra*.

miles of dual pipelines located on the bottomlands with a pipeline located in a tunnel, as contemplated in Act 359 and various agreements with the State; and (2) the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority, and MEPA (initial ruling, p. 14)"³⁸ As a result, Appellants were forced to limit their presentation of evidence on public need and the alternative to the Straits segment.³⁹

Enbridge considered three pipeline alternatives to transport its petroleum products across the Straits: a new trenched and rock covered pipeline, and a bored pipeline beneath the lakebed. It also looked at a "no action" which it described as a comparison of the risks of the more dangerous existing dual pipelines based on the mere assumption, not fact, if the tunnel pipeline is not approved, the existing dual pipelines would continue.⁴⁰ "[T]he purpose of the Replacement Project has always been to ensure the continued operation of Line 5." On cross examination, Enbridge witnesses testified that its analyses were confined to the pipeline alternatives across the Straits.

Q (By Mr. Olson): So, let's take it one at a time, Ms. Pastoor. To your personal knowledge and in your position as project manager, can we conclude from this that with respect to this project, the alternative analysis that you're presenting did not include analysis of other pipeline routes outside of the Straits of Mackinac, other locations or routes not involving the Straits of Mackinac?

A Our analysis was specifically focused on the four-mile segment replacement at the Straits of Mackinac, so as that was the task, we considered alternatives for replacing the dual pipelines within the Straits of Mackinac, so that's how we approached this.

Q All right. But you have not considered -- you did not consider ... alternative locations, other pipelines with capacity of Enbridge's system?

³⁸ U-20763-1454, December 2023 Order, p. 15.

³⁹ Appellant FLOW submits this limited alternative analysis constitutes clear and reversible error under MEPA and its jurisprudence. See Argument, II.A., this Brief.

⁴⁰ 12 Tr 1795 [FLOW Appendix 11].

A Well, no, because the task was to consider how do we replace the dual pipelines...

Q All right. ... Did you consider no tunnel ...?

A ...[T]he objective was how do we replace the dual pipelines, so that we... considered alternatives for replacing the dual pipelines.

Q So you didn't look at the no tunnel, ... you didn't look at not doing a project at all?

A Well, no, because the ask was how do we replace the dual pipelines.⁴¹

Enbridge's Alternatives Analysis only evaluated feasibility, costs and engineering, environmental impacts, and approvals and authorizations necessary for the three pipeline alternatives to the dual pipelines.⁴² Alternative 2 was withdrawn.⁴³ The Commission found that the Tunnel Project would have the least environmental damage compared to the other two alternatives or the continued operation of the dual pipelines.⁴⁴ But the Commission then ignored its own orders⁴⁵ and considered the Dynamic Risk ("DR") report that looked at two other alternative pipeline routes, north around Lake Superior and a new pipeline across southern Michigan from Chicago to Sarnia.⁴⁶ The DR Report is seven years old. Its stated purpose was limited to the Straits segment. It pointed to these alternatives outside the Straits in an effort to compare their risks to the Tunnel Project. The Commission reviewed these alternatives during the review of the record for its decision without benefit of any submissions from Appellants on alternatives to Line 5 outside the Straits. Moreover, the DR report compared risks of the three alternatives in the Straits and was not a comprehensive alternatives report.⁴⁷

⁴¹ 7 Tr 585-586 [FLOW Appendix 12].

⁴² See, Exhibit A-9, p. 5; 12 Tr 1722 [FLOW Appendix 13].

⁴³ Exhibit A-9, p. 53.

⁴⁴ Id., p. 304; U-20763-1454, Order, p. 64; see Exhibit A-10, pp. 2-3.

⁴⁵ Id., pp. 331-335.

⁴⁶ Id., pp. 331-333.

⁴⁷ Id., pp. 331-332, 341-342.

c. Review of “Public Need” under Section 3(1) of Act 16, MC 483.3(1).

Similar to the segmentation of the alternatives analysis described above, the Commission’s orders narrowed this broad prescription. Again, the DR report narrowed the scope of analysis on need to the Replacement project and “the risks associated with Enbridge Pipelines’ existing [dual pipelines].”⁴⁸

Next the Commission referenced the series of agreements between Enbridge and the DNR that contemplated the Replacement Project as evidence the public need for the tunnel and pipeline. Then it noted the 1954 decision in *Lakehead Pipe Line v Dehn, supra*, as evidence of public need in 2023.⁴⁹ Then the Commission affirmed its order on the motion in limine that the issue of public need was limited to the Replacement Project— “[A] project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern existing pipeline that is merely interconnected with the segment,” “The public need for the existing portions of Line 5 has been determined, but the public need for the Replacement Project has yet to be determined.”⁵⁰ Once more, the Commission ignored its own orders limiting its review of the Replacement Project⁵¹ by considering alternatives and public need outside the Straits while precluding Appellants from presenting evidence concerning the larger public needs public interests associated with the intertwined Tunnel Project and all of Line 5.⁵²

d. The Larger Public Need and Public Interest Associated with the Paramount Public Trust Waters and Bottomlands of the Great Lakes.

⁴⁸ U-20763-1454, Order, p. 293.

⁴⁹ Id., p. 39; *Lakehead, supra*, 348 Mich at. 37.

⁵⁰ Id., p.50; see April 21 Order, p. 63.

⁵¹ Id., p.303, citing Exhibit ELP-24, pp. 348-350, 362-367.

⁵² Id., p. 305

Appellant FLOW, in its briefs in the contested case, included cogent information on the requirements to determine the significant risks and costs associated with GHGs and energy markets as the state and nation shift toward renewable energy to reduce the risks and already dramatic damage from climate change.⁵³ Further, there is a marked difference in this case from other pipeline cases because of the recognized legal fact of the public interests and State's responsibilities of as trustee in the waters and bottomlands of the Straits under public trust law and the Great Lakes and Mich Const. 1963, art. 4, sec. 52. Enbridge's witness Ms. Pastoor testified that she had personal knowledge of all of the exhibits, including Ex A-6, the 2018 Easement and 2018 Assignment of Easement for the Tunnel Project. After discussion with counsel, she reaffirmed her answer that she had no knowledge of Enbridge having or holding any document authorizing any such agreements or conveyances.⁵⁴ On December 17, 2018, DNR conveyed an easement to MSCA to construct a tunnel under the lakebed of the Straits, which included the assignment of easement to Enbridge.⁵⁵ Enbridge's project supervisor testified that Enbridge did not apply for or obtain authorization for the easement and other conveyances under sections of the GLSLA, MCL 324.32502-32508.⁵⁶

II. ARGUMENTS

A. Standard of Review

1. The MEPA:

Section 1705 of the Michigan Environmental Protection Act ("MEPA"), MCL 342.1705(2) requires courts, in any judicial review of an agency proceeding and action, must determine whether

⁵³ U-20763-1083 Brief of Intervenor FLOW [FLOW Appendix 14] and U-20763-1110 Reply Brief. [FLOW Appendix 15].

⁵⁴ 7 Tr 580-583, Transcript of Cross-Examination of Amber Pastoor [FLOW Appendix 16].

⁵⁵ Enbridge A-6, 20763-1038, FLOW Brief, pp. 117-123.

⁵⁶ 7 Tr-643-646, Transcript of Cross-Examination of Paul Turner [FLOW Appendix 17].

or not there is likely pollution, impairment, or destruction of the air, water, natural resources, or the public trust in those resources; if a court determines there are such likely effects, the court must determine if there is a feasible and prudent alternative. *Id.*, MEPA requires courts to review administrative agency actions de novo, rather than the deferential standards for judicial review of administrative actions. *West Michigan Environmental Action Council, Inc v. Natural Resources Comm'n*, 405 Mich 741, 753-754; 275 NW2d 538 (1979); *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 471; 554 NW2d 328 (1996). Whether the PSC exceeded or violated the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003). 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 MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999)

2. Appeal of the Commission's Final Order

An appeal final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. *In re Consumers Energy Co*, 279 Mich App 180; 756 NW2d 253 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing 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 MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court “gives due

deference to the PSC’s administrative expertise and is not to substitute its judgment for that of the PSC.” *Attorney General v Pub Serv Comm No 2, supra.*

B. The Commission’s December 1, 2023 and April 21 Orders that confined consideration of alternatives to the Straits segment of the Line 5 pipeline violate the Commission’s mandatory duty under the Michigan Environmental Protection Act, MCL 324.1701 et seq., to comprehensively determine whether there exist feasible and prudent alternatives to Line 5 that would avoid its finding that the Enbridge Tunnel Pipeline Project is likely impairment of the environment to Line 5.

1. The Commission’s Orders, including its Final Order on December 1, 2023, violated the mandatory duty of comprehensive and broad review under Article 4, Section 52 of the Michigan Constitution and the Michigan Environmental Protection Act.

The Michigan Constitution, 1963, art. 4, sec. 52 provides:

Sec. 52: The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Section 52 imposes a self-executing, mandatory duty on the legislature to enact legislation to protect Michigan’s air, water, and antral resources. *State Highway Comm’n v Vanderkloot*, 392 Mich 159, 179, 182, 220 NW3d 416 (1974). Pursuant to this constitutional duty, the legislature enacted, among other environmental laws, the Michigan Environmental Protection Act of 1970, MCL 324.1701 et seq., (“MEPA”). As the Supreme Court in *Vanderkloot*, stated,

The Environmental Protection Act of 1970 * * * represents a comprehensive effort on the part of the legislature to preserve, protect and enhance the natural resources so vital to the wellbeing of this State * * *. The act is broad indeed and applies to state agencies and private individuals. * * * This language does not confine itself to any one narrow area but applies to any action on the part of any public agency or private entity which has harmed the environment or is likely to do so. This of course includes the

planning and construction of the State's highway system and a myriad of other public and private activities. 392 Mich at 183.

The enactment of MEPA “signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies... Not every public agency proved to be diligent and dedicated defenders of the environment.” *Ray v Mason County Drain Comm'r*, 393 Mich 294, 305, 224 NW2d 883 (1975).

MEPA imposes a duty on both public and private actors "to prevent or minimize degradation of the environment." *Id.* at 306. MEPA authorizes courts to develop "a common law of environmental quality." *Id.* MEPA requires courts to review agency actions de novo, rather than pursuant to the usual deferential standards for judicial review of administrative actions. *West Michigan Environmental Action Council, Inc v. Natural Resources Comm'n*, 405 Mich 741, 753-754; 275 NW2d 538 (1979).

In *Vanderkloot*, the Court pointed to the Highway Commission’s “planning and construction of the State’s highway system and a myriad of other public and private activities” in conjunction with a necessity issue in a condemnation case for a segment of an expressway project. The Court held that the MEPA imposes substantive duties on an agency to comprehensively consider and determine likely effects and alternatives.⁵⁷ The duty and scope of review imposed on agencies are broad.⁵⁸

⁵⁷ For example, see the description by the Court for the kind of early, broad review of ecological effects and range of alternatives that would avoid, prevent, or minimize such effects regarding highways, public utilities, and other major projects. 392 Mich at 183. Further, the Court expressly encouraged public agencies, private entities, and the courts in the future to look to the National Environmental Policy Act environmental impact statement requirements, 42 U.S.C. 4321(2)(C), and, at the time, Governor Milliken’s Executive Order 1971-10, requiring agencies to prepare impact statements to fulfill its constitutionally-based duties under the MEPA. *Id.*, at 187.

⁵⁸ The Court went on to hold that there are two basic causes of action under the MEPA: (1) an action brought under the express judicial review established by the MEPA itself, and (2) an action brought to enforce the substantive duty to comprehensively consider likely effects and a broad

Section 1705(2) of the MEPA, MCL 324.1705(2), requires a state agency, like the Appellee Commission, to determine the likely “pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources” before it can approve a project. If it determines such pollution or impairment is likely, the 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.” *Id.*

Moreover, Section 1706(1), MCL 324.1706(1), makes explicit that Section 1705(2), “shall be *supplementary* to existing administrative and regulatory procedures provided by law.” Failure on the part of an agency in the exercise of its review of an application for permit or other approval to fully and comprehensively consider such likely effects and whether there are feasible and prudent alternatives violates the MEPA. *Vanderkloot*, 392 Mich at 190.⁵⁹ The Court stated that “since the environmental constitutional provision and EPA, there are new considerations in the proper exercise of Commission discretion in the choice of alternatives.” 392 Mich at 183.

As described in the facts section in this Brief, the Commission ruled that its review was limited to the Straits segment, because in previous cases it has never reviewed the remainder of a proposed pipeline, where the application is for only a segment. Nothing in Act 16 and its rules and the MEPA limits the Commission’s review to the segment before it. That the Commission relies only on its decisions in other cases, when each case turns on its own particular facts, institutionalizes segmentation and would, if not overturned in this case, opens the door to abuse by applicants who can manipulate their application by narrowly describing the scope of the project

range of alternatives to prevent or minimize such effects.⁵⁸ *Vanderkloot*, 392 Mich at 190; *Ray v Mason County Drain Comm’r*, 393 Mich 294, 306, 224 NW2d 883 (1975).

⁵⁹ See also *Buggs v Mich. Pub. Serv. Comm’n*, unpublished per curiam opinion of the Court of Appeals issued January 13, 2015 (Docket Nos. 315058, 315064) [FLOW Appendix 18].

to evade review of public need, likely environmental effects, and alternatives that are required by law. When the Commission defined the scope of review of MEPA by its internal practice of segmentation from a pipeline as a whole, it violated the clear intent of Section 1705(2) and mandate under *Vanderkloot* that the examination of alternatives must be comprehensive and broad.⁶⁰

Again, MEPA is supplemental to existing laws and agency proceedings. Section 1706(1). Nowhere in Act 16 is there language that limits the scope of review under MEPA. No where in Section 1705(2) or MEPA did the legislature limit an agency's duty to consider and determine effects and alternatives to conduct. The new tunnel and pipeline and the continued existence or need for Line 5 are also inseparable. The alternatives to the Tunnel and new pipeline, the existing dual lines, and non-Straits alternatives are inseparable. If the commission's narrow construction of Act 16 and MEPA is not reversed, the any state agency in the future would foreclose critical alternatives and thwart the very purpose of MEPA to assure a comprehensive and broad review of likely effects and alternatives.

For this reason alone, the Commission's decision should be reversed and remanded to comply with the substantive duties imposed by the MEPA.

2. The Commission's Orders, including its Final Order, December 1, 2023, violated Section 1705(2) of the MEPA, MCL 324.1705(2), and its common law of environmental quality.

In addition to the violation of the mandatory duty to consider a broad range of likely effects and alternatives under Section 1705(2) and *Vanderkloot*, the Commission violated its duty to deny authorization of the Tunnel Project under Section 1705(2) of the MEPA, MCL 324.1705(2). Appellants intervened in the contested case pursuant to MCL 324.1705(1). Section 1705(2), *supra*, provides:

⁶⁰ U-20763-1454, Dec. Order, p. 70.

Sec. 1705. (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.

a. The Commission committed reversible error when it limited its review and evidence of the likely effects to the Tunnel Project to just the Straits segment of the Line 5 pipeline.

As described above, Section 1705(2) required the Commission to determine the alleged pollution, impairment, or destruction of air, water, or other natural resources, or the public trust in these resources. Appellants alleged likely pollution, impairment, or destruction of the waters and natural resources or public trust in the waters and aquatic resources of the State, the Straits, Lake Huron, and Lake Michigan. While Appellants alleged concerns and provided evidence, relied on by the Commission, of likely impairment in the Straits, neither Section 1705(2) nor Appellants allegations concerning effects and alternatives are limited to the Straits, but extend to the entire Line 5. When the Commission narrowed its determination of such likely effects (and alternatives) to the Tunnel Project pipeline segment, and cutoff review of such effects beyond the Straits or associated with the continued operation of Line 5, which according to the lease-back of the tunnel to Enbridge, is for 99 years, it violated MEPA and its common law of environmental quality. *Vanderkloot, Ray, Western Michigan Env. Action Council, supra.*

The Tunnel Project has no independent utility of its own. Without Line 5, there would be no need for a tunnel or pipeline cross. The Tunnel Project and all of Line 5 are intertwined and unextractable. *In Not Another Power Plant v Conn. Siting Council*, 340 Conn. 762; 265 A3d 900

(2021), the Connecticut Supreme Court reversed the defendant's approval of an electrical generating facility where it segmented and did not determine the environmental effects of an updated natural gas pipeline that was intertwined with the generating facility. The defendant's cutoff of the pipeline violated a state environmental statute that was patterned after MEPA with a provision identical to Section 1705(2).⁶¹ The court held that defendant could not segment a pipeline that was intertwined with its environmental determinations of effects of the facility because it violated the duty imposed on it to protect the environment of the state.⁶²

Accordingly, the Commission's decision that segmented its finding of likely environmental effects of the Tunnel Project in the Straits from the intertwined, unextractable connection to Line 5 is contrary to Section 1705(2) and is unlawful.

- b. The Commission's Order Approving the Tunnel Project is prohibited where it has determined that the Tunnel Project is likely or will cause pollution, impairment, or destruction of water, natural resources, and the public trust interests unless it lawfully determines there is no feasible and prudent alternative.**

It is uncontested in this Appeal that the Commission determined under Section 1705(2) that The Commission found that likely environmental impacts from construction of the Replacement Project, and that, "These impairments included increased noise, dust/particulates, and light from construction, and impacts to surface water, local residents, flora, fauna, air quality, groundwater, surface soils, and vegetation".⁶³ The Commission found that these impairments "are

⁶¹ Conn. General Statutes Sec. 22a-19(1)(a).

⁶² In accord, *Stewart Park & Reserve Coalition v Slater*, 352 F3d 545. 559-60 (2d Cir. 2003) ("A project has been improperly segmented... if the project has no independent utility on its own, or is simply illogical when viewed in isolation); *Delaware Riverkeeper v Federal Energy Commission*, 753 F3d 1304 (D.C. Cir. 2014) (An agency impermissibly segments when it divides connected, cumulative... actions into separate projects and thereby fails to address... the true scope of the activities that should be under consideration).

⁶³ U-20763-1454, Dec. 2023 Order, p.329.

environmental impairments pursuant to MEPA.”⁶⁴ Further, the Commission found that “GHGs are widely recognized as pollutants that trap heat in the atmosphere and contribute to climate change, thereby polluting, impairing, and destroying natural resources,”⁶⁵ and concluded “that the proposed conduct, i.e., the Replacement Project, is likely to pollute, impair, and destroy natural resources, the Commission may not approve the action if there is a feasible and prudent alternative.”⁶⁶

In its Final Order the Commission determined that the Tunnel Project would result in likely pollution or impairment of the water, natural resources, or the public trust in the Straits and adjacent land.⁶⁷ The Commission recognized that it could not approve the Tunnel Project “if there is a feasible and prudent alternative.”⁶⁸ Just because the Tunnel and pipeline may be viewed as a better alternative than others in the Straits segment is immaterial, given the Commission’s uncontested finding that the tunnel project is likely to pollute or impair and is prohibited under Section 1705. Absent a finding that there is no feasible and prudent alternative as required by MEPA of a non-Straits alternative, the Commission’s approval is prohibited. The Commission’s final Order should be reversed and the proceeding remanded for a full MEPA review and examination of alternatives in accordance with Section 1705(2).

- c. The Commission’s Order approving the Tunnel Project is Contrary to Section 1705(2) because it failed to review and determine whether there is a feasible and prudent alternative to Line 5 where the Tunnel Project is inseparable from Line 5 as a whole.**

⁶⁴ Id., p. 329

⁶⁵ U-20763-1454, p. 331; Exhibits ELP-2, ELP-3.

⁶⁶ Id., p. 331

⁶⁷ Id., p. 329

⁶⁸ Id., p. 331.

The Commission determined that there were no feasible and prudent alternatives to the Tunnel and pipeline because it would eliminate the substantial risk to the Great Lakes from the dual pipelines in the Straits. If the primary object in approving the Tunnel was to remove the risks to the Straits and Great Lakes, then other alternatives to Line 5 other than the Straits would necessarily achieve that same objective. In fact, where the Commission has found there are likely environmental effects from the Tunnel and Line 5 in the Straits, under Section 1705(2) the Tunnel cannot be approved. It necessarily follows then that for the Commission to approve the Tunnel Project it must determine whether exists an alternative other than the Straits to Line 5 as a whole. As described above, the Commission committed reversible error when it excluded its scope of review outside of the Straits.⁶⁹

Section 1705(2) does not limit its review based on the scope of review of applications under any other statute. MEPA is the legislature's response to the constitutional mandate to protect the environment of the state from pollution or impairment and requires consideration of a comprehensive and broad range of alternatives. *Vanderkloot, supra*. *Vanderkloot* involved the condemnation of land as part of a state highway department "necessity" requirement. The Court held that the failure of consideration of a broad range of alternatives to a highway project violated the duty to fully consider alternatives and constituted an abuse of discretion. "[S]ince the environmental constitutional provision and EPA, there are new considerations in the proper exercise of Commission discretion in the choice of alternatives." 392 Mich at 183. MEPA is a source of supplementary *substantive* environmental law. *Vanderkloot*, at 184; see Sax and Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1004, 1054-1064 (1972). The MEPA "is broad indeed and applies to state agencies and private

⁶⁹ Id., U-20763-0713, April 2021 Order, p. 60.

individuals.” *Id.* The “language does not confine itself to any one narrow area but applies to any action on the part of any public agency or private entity which has harmed the environment or is likely to do so. *Id.* This of course includes the planning and construction of the State's highway system and a myriad of other public and private activities. *Id.*

The Commission’s decision in effect determines a new or expanded role in the future for Line 5 without addressing the feasibility and prudence of the investigation and a determination of alternatives to Line 5 in the Straits. A decision on the Tunnel Project is a decision on all of Line 5 and implicates the duties imposed by the MEPA to consider broadly effects and alternatives and prevent likely environmental degradation, *Ray, Vanderkloot, supra*, and Section 1705(2). The segmentation of the duty to determine likely environmental effects, addressed in subsection Argument A. 2. b., *supra*, applies with equal if not greater force to the duty to actually determine whether there is a feasible and prudent alternative under Section 1705(2). *Vanderkloot; Connecticut Siting Council, supra.*

Accordingly, the Commission’s final Order is contrary to law and its approval should be reversed.

- d. The Switch by the Commission, after its orders limiting review and evidence regarding alternatives outside of the Straits, to justify its finding there is no feasible and prudent alternative by looking to alternatives to Line 5 as a whole was clearly erroneous, an abuse of discretion, and resulted in a manifest injustice.**

The Commission limited its analysis under Section 1705(2) to the Replacement Project in the Straits section of Line 5.⁷⁰ In its Final Order, the Commission switched, inexplicably, from its exclusion of review and evidence to the Straits segment to a consideration of alternatives to Line 5; it compared the risks of pipelines alternative to transport crude oil without Line 5 at all. The

⁷⁰ *Id.*, p. 67.

Commission's switch is confounding and contrary to MEPA. For example, in finding likely impairment of the environment from GHGs under Section 1705(2), the Commission looked at the crude oil transported in Line 5 as a whole.⁷¹ There are not two conflicting scopes of review, one for impairment, and another for alternatives. Moreover, the switch in the Commission's review and order to non-Straits alternatives while excluding by its orders evidence on those alternatives by Appellants is clear error that resulted in a manifest injustice to Appellants. The Appellants were deprived of their right to present evidence on non-Straits alternatives to Line 5 as required by law under the MEPA and fundamental rules of evidence.

e. In any event, the Commission final December 1, 2023 Order violates the standard of proof and legal standard for establishing there is no feasible and prudent alternative under Section 1705(2) of the MEPA.

The MEPA and the appellate decisions of the State constitute Michigan's "common law of environmental quality." *Ray, supra*, 393 Mich at 307, fn. 10. Under Section 1703(1), Once there is a determination of likely impairment or pollution under the MEPA, the burden of proof shifts to the defendant to prove no feasible and prudent alternative. MCL 324.1703(1); *Ray, supra*, at 308-309. Where it is determined there is likely impairment, the agency, the Commission in this case, is prohibited from approving the conduct unless there is no feasible and prudent alternative. Section 1705(2) requires agencies, or courts "in judicial review thereof," to determine likely impairment and no alternatives based the same standards as Section 1703(1). Because the determinations are the same, the burden of proof under Section 1705(2) is on Enbridge to establish before the Commission no feasible and prudent alternative.

In addition, to establish that there is no feasible and prudent alternative, the defendant must prove that the alternative is "prohibitively expensive." *Wayne County Health Dept. v Olsonite*

⁷¹ *Id.*, p. 64.

Corp., 79 Mich App 668, 704, 263 NW2d 778 (1977). To prove an alternative is not prudent, the defendant must prove there are “truly unusual factors” that reach “extraordinary magnitudes.” *Id.*, at 705. In *Olsonite*, the Court of Appeals held that the defendant did not establish no feasible and prudent alternative, because the costs were not so extraordinary as to be prohibitive, and because the defendant failed to conduct an “earnest examination” of the alternative it claimed was not feasible and prudent. *Id.*, at 706.

The Commission in its final Order pointed to other means of transporting crude oil, including existing pipelines and excess capacity or cost of adjustments to achieve the same needs for transport of products. It did not exam the question itself, the issues were not thoroughly examined because of the Commission’s limitation of review and evidence to non-Straits alternatives. The Dynamic Risk Report by its express terms, as described above, was limited to the three pipeline alternatives in the Straits, and made statements, without references or studies, about the effects on stream and water crossings and effects of non-Stratis alternatives for purposes of comparing risks with the Tunnel Project in the Straits. The Commission Order committed a serious error of law when it relied on *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 554 NW2d 328 (1996). *Friends of Crystal River* interpretation of the alternative test as “suitable” under the Wetlands Protection Act is inapposite to MEPA, *Olsonite, supra*, and MEPA’s common law of environmental quality and is inapposite. Moreover, neither the Commission nor Enbridge, on the record in this case, made an earnest attempt to exam the non-Straits alternatives, and did not establish these were infeasible or imprudent based on “truly unusual factors” that reached “extraordinary magnitude” or that were “cost prohibitive.”

Accordingly, the Commission’s final Order is contrary to law and the exclusion of evidence required by Section 1705(2) constituted reversible error; the final Order should be reversed and

remanded to comply with the scope of review and evidence of an earnest review of feasible and prudent alternatives to Line 5 as a whole.

C. The Commission Failed to Properly Consider the “Public Need” for the Project Beyond the Mere Need for the tunnel and new Pipeline.

Prior decisions by the Commission have affirmed the criteria defining the scope of the Commission’s review under Act 16 of 1929, MCL 483.1 et seq (Act 16) and the Commission’s Rules of Practice and Procedure, Mich Admin Code, R 792.10447 (Rule 447). The Commission’s analysis under Act 16 requires three findings; 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.”⁷² The Commission’s orders found that public need was confined to the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, but that it does not include other vital public interests directly related to the public need of the Replacement Project: “The public need for the existing portions of Line 5 has been determined, but the public need for the Replacement Project has yet to be determined.”⁷³

1. Examination of “Public Need” is An Essential Element for Siting, Eminent Domain, Acquisition, Construction and Operation of a Certificate of Need Determination.

A crude oil pipeline company has no authority for condemnation or use of public rights-of-way unless authorized under Act 16. MCL 483.1(2). Private property shall not be taken for public use without just compensation therefore in a manner prescribed by law. Mich Const., art. 10, sec.

⁷² U-20763-1454, Dec. 2023 Order, p.37.

⁷³ U-20763-0713, April 21 Order, p. 63.

2. The Crude Oil Pipeline Siting Act, MCL 483.2 authorizes a pipeline company to acquire rights-of-way. The authority is backed by the power of eminent domain. MCL 483.2a. Enbridge had to acquire extensive private property and state public trust bottomlands. Enbridge is required to obtain all authorizations that are required by law, such as the Great Lakes Submerged Lands Act and MCL 324.2129 for easements over trust bottomlands. To acquire, site, construct and operate an oil or liquids pipeline, Enbridge must obtain a certificate of necessity to that there is a “public need.” The Certificate of Necessity (CON) is to determine whether there is a “public need” and whether it is in the “public interest” to authorize a new or expanded service.⁷⁴

To comply with the “public need” criteria under Act 16, it is the Commission’s responsibility to ensure that Enbridge’s request for a Certificate of Necessity entails a thorough analysis that evaluates larger public interests than just the Tunnel Project’s stated purpose, such as future demand for the conveyance of transportation fuels and related infrastructure, including the market, financial and regulatory risks such infrastructure may present. In *Lakehead Pipeline Co. v Illinois Commerce Commission*, 296 Ill. App.3d 942, 696 NE2d 346 (Ill. App. 1998), the court affirmed an order of the defendant Commerce Commission that required review of the larger public need of an entire crude oil pipeline. The court rejected Lakehead’s argument that public need is limited to the purpose of transporting crude oil that benefits the public.

The Commission found that the purpose of the project is to “alleviate an environmental concern to the Great Lakes” posed by the dual pipelines.⁷⁵ This includes consideration of Line 5 as a whole, including the costs, benefits, and larger public interest of the State of Michigan for

⁷⁴ Id.; W.K. Jones, Columbia Law Review, *Origins of the Certificate of Public Convenience and Necessity*, Vol. 79, No. 3 (April 1979), p. 427

⁷⁵ Application, p. 1; U-20763-1454, Dec. 2023 Order, p. 342.

alternatives to Line 5. The Commission in this case should have evaluated whether the economic and environmental risks are congruent with the public interest.

Further, article 4, section 52, Mich Constitution, declares that “the air, water, and natural resources of the state are of paramount public concern.” The MEPA was enacted to protect these natural resources or public trust in those resources from likely risks or actual pollution or impairment. MCL 324.1701 et seq., supra. Under common law, the state owns and holds the waters and bottomlands of the Straits and Great Lakes in public trust. The state as trustee has a mandatory obligation to consider the effect on these public trust rights and interests as part of “public need.”

Nowhere in Act 16 does the law limit the Commission’s authority to consider vital public interests regarding the undisputed fact that all of Line 5 is intertwined and interconnected with the Tunnel Project. The public need of Line 5 cannot be frozen in time based on the circumstances in 1953. The 1953 Order is subject to changes and circumstances and changes in or enactment of new laws, the Michigan Constitution, art. 4, sec. 52, the major new concern for climate change and its impact, Gov. Executive Order 2020-18, including markets and renewable energy, promoted by Michigan’s new clean and renewable energy laws that establish critical new goals and requirements to promote the public interests of the citizens of Michigan facing the devastating effects of climate change.⁷⁶

Nowhere in the record is there any analysis of public need, future market demand for transportation fuels, cost-benefit analysis, or an accounting of costs associated with the public needs of the project. Determining whether a project may present a financial risk is a core function of the commission. Yet the Commission dismisses the need for any economic analysis based upon the 70-year-old original 1953 determination of public need that accompanied the construction of

⁷⁶ PA 341 and 342 of 2016; PA 295 of 2008; PA 233 of 3023; PA 235 of 2023.

the submerged section of Line 5.⁷⁷ In so doing, the Commission rejects modern principles and practices governing the analysis of risk, cost-benefit analysis, alternatives, economics, and science. The Commission failed to include the paramount interests of its water and natural resources and public trust in the Straits. Its failure to fully establish a “public need” under public trust law that includes these larger vital public interests breached its responsibility to protect these interests under public trust law⁷⁸ and the duty to prevent likely environmental harm under the MEPA. *Ray v Mason County, supra*, at 306. Failure to consider these vital public interests in its determination of public need” violated its obligations under Act 16 and is contrary to law.

2. Policy Implications.

To demonstrate, not for factual findings which were precluded by the Commission’s rulings and its December 2023 Order, but why these larger paramount “public interests,” such as the costs, environment, economics, and financial aspects are vital to review in this case, the National Association of Regulatory Utility Commissioners’ (NARUC) guidance is explicit on the need of public utility commissions to assess risk:

“Rather than comparing expected return to perceived risk, utility regulators typically want to minimize rates or cost of service or both, while taking into account the degree of risk that ratepayers will face, as well as the risks to investors. Thus, there is a need to balance the expected cost of a resource, or a portfolio of resources, with the risk

⁷⁷ “As such, the ALJ held: Based on those standards, this case involves a review of the proposed pipeline relocation under Act 16 to determine whether a public need exists for it, whether it is designed and routed in a reasonable manner, and whether its construction will satisfy applicable safety and engineering standards. Accordingly, any issues concerning the current or future operational aspects of the entirety of Line 5, including the public need for the 645-mile pipeline that was approved by the Commission in 1953 and affirmed in *Lakehead Pipe Line Co., supra.*, is outside the scope of this case. Initial ruling, p. 15 (note omitted). The Commission agrees.” April 21, 2021 Order, p.60.

⁷⁸ See Section II, B. 5. this Argument, *infra*.

that the actual cost of the resource may be more or less than expected at various times over the planning horizon.”⁷⁹

The U.S. Environmental Protection Agency’s guidance is in accord, indicating that public utility commissions must develop and examine key analysis factors, such as demand forecasts, commodity price forecasts, and available alternative resource options.⁸⁰

In this case, the Commission’s determination of “public need” is without any analytical framework. While pipelines are essential components of energy transportation infrastructure, public utility commissions are tasked with evaluating proposals for new pipelines infrastructure to ensure they meet the genuine needs of the public. In prior cases the Commission has acknowledged the responsibility to determine whether a project is in the public interest. “Inherent in that jurisdiction is the power to make a qualitative evaluation regarding whether a proposed system would be safe and in the public interest.”⁸¹

The confluence of demand and supply side preferences, market forces, climate concerns driving public and private sector efforts to reduce carbon emissions, and regulatory policies are accelerating the transition to a global clean energy economy. The electrification of transportation, as a market driven force, will reduce demand for refined oil products over time and concurrently, will reduce the future need for pipeline capacity. Examination of current and future demand forecasts for the transport of crude oil would show that a large capital expenditure on pipeline-

⁷⁹ *Energy Portfolio Management: Tools & Resources for State Public Utility Commissions*, <https://pubs.naruc.org/pub.cfm?id=536E43E4-2354-D714-51C4-DAD3C6A8D5B3> Although the NARUC paper concerns electric utility infrastructure, the same analytical principles should apply.

⁸⁰ EPA’s guidance to public utility commissions, *Electricity Resource Planning and Procurement*, https://www.epa.gov/sites/production/files/2017-06/documents/gta_chapter_7.1_508.pdf

⁸¹Case No. U-12334, citing *Lakehead Pipe Line Co v Dehn*, 340 Mich 25; 64 NW2d 903 (1954), March 7, 2001 Order.

related infrastructure is imprudent and inconsistent with the Commission’s responsibility to protect consumers. Even if the applicant fulfills all other requirements, the certificate of need or determination of “public need” should be denied if the commission’s analysis determines there is no market need or the services are not in the public interest.⁸²

The U.S. Energy Information Administration predicts that U.S. gasoline consumption will continue to decline⁸³ while the International Energy Agency forecasts global demand for transportation fuels will peak in 2028 with gasoline consumption declining in 2024.⁸⁴ Long-term market trends and recent events strongly suggest the need for fossil fuel-related infrastructure is decreasing significantly. Petroleum industry economists are warning that peak oil demand is near or may have already arrived. BP’s (British Petroleum) chief economist explained why BP will undertake a fundamental restructuring of its business model to invest in zero-carbon energy sources.⁸⁵ The reduction in the use of transportation fuels accompanying vehicle electrification will have a corresponding negative effect on pipeline utilization and capacity needs, especially for Enbridge, the largest carrier of expensive, emission-intensive, oil derived from tar sands. Market trends beg the question of whether there is a future market need for Enbridge’s current carrying capacity in its pipeline system. It is incumbent upon the Commission to conduct its own analysis

⁸² *Supra*, note 1

⁸³ EIA, January 17, 2024 <https://www.eia.gov/todayinenergy/detail.php?id=61243>

⁸⁴ IEA, Oil 2023, <https://www.iea.org/reports/oil-2023/executive-summary>

⁸⁵“The advent of electric vehicles and the growing pressures to decarbonize the transportation sector means that oil is facing significant competition for the first time within its core source of demand. This has led to considerable focus within the industry and amongst commentators on the prospects for peak oil demand – the recognition that the combined forces of improving efficiency and building pressure to reduce carbon emissions and improve urban air quality is likely to cause oil demand to stop increasing after over 150 years of almost uninterrupted growth.” BP, Peak oil demand and long-run prices, <https://www.bp.com/en/global/corporate/energy-economics/spencer-dale-group-chief-economist/peak-oil-demand-and-long-run-oil-prices.html>

of market trends to ascertain the extent to which there is a “public need” for the tunnel or whether the tunnel is in the public interest.

3. Enbridge Acknowledges that Climate Concerns Will Reduce the Service Life of the Tunnel.

The existential risks of climate change and the need to strictly limit greenhouse gas emissions is another risk factor that militates against the need for a tunnel. Enbridge clearly recognizes the implications of future regulatory policies aimed at reducing carbon emissions. On May 21, 2021, Enbridge notified the Federal Energy Regulatory Commission that it had completed a “technical update depreciation study to assess the remaining service lives of all its carrier property” and requested permission to “truncate” the depreciation period of its pipeline system based upon market forces that will limit the service life of its assets:

There are several factors, considerations and uncertainties which support the use of a December 31, 2040, truncation date. These include current and anticipated competition to the Enbridge Mainline, actions by state and local governments and the uncertainty arising from the recent acceleration in the pace of Federal (United States and Canada), state/provincial and local governments passing decarbonization legislation or adopting policies that may influence the market demand for pipelines. An example of the latter is found in the recent issuance by President Biden of an Executive Order 13133 titled:” Tackling the Climate Crisis at Home and Abroad” , which unveiled detailed climate plans designed to meet his campaign promise that the United States achieves a 100% clean energy economy and net zero emissions no later than 2050.⁸⁶

⁸⁶ Enbridge May 2021 Depreciation Study Update, May 21, 2021 https://d3n8a8pro7vhmx.cloudfront.net/oilandwaterdontmix/pages/26/attachments/original/1638974675/Enbridge_depreciaton_study.pdf?1638974675

The Commission blithely dismissed the offer of proofs of declining demand, stating that the economics of fossil fuel pipelines, the risk of stranded costs cannot be considered and are outside the scope of this case.⁸⁷ In *Vanderkloot*, the Michigan Supreme Court noted “that “the public interest has been threatened by casual planning of transmission lines and pipelines” and that “the growing public awareness that ecological considerations are just as important to the public interest as the benefits of improved public services resulting from new construction.”⁸⁸ Given the strong market trends favoring the transition to zero carbon energy generation resources and the abundant and growing evidence of the environmental, economic, and public health impacts associated with the development and combustion of fossil fuels, the Commission must analyze the pertinent data and information in order to make an informed determination regarding whether the project is in the public interest.

4. The State of Michigan has made new commitments to integrate climate change into government decision-making.

The Commission should have required Enbridge to evaluate future market, financial and regulatory trends to demonstrate that projects are necessary and prudent in light of environmental, climactic, and public health concerns, and the energy transition that is underway. Generally

⁸⁷ Order, p.51

⁸⁸ The *Vanderkloot* court went on to state:

“Recently in Michigan this same public awareness has focused on the environmental impact of public utilities construction. * * * :

"Monitoring Michigan's Utilities": "Michigan's need for adequate supplies of electricity and gas at reasonable prices and without despoiling the state are eventually going to make imperative the controls on utility plant siting and monitoring of management decisions recommended by Gov. Milliken.

"For the better part of a century the utilities built pretty much where and as they pleased without controversy. But as the state has grown, and the demand for energy, the public interest has been threatened by casual planning of transmission lines and pipelines through unspoiled countryside. *Vanderkloot*, footnote 10.5.

accepted methodologies are available to quantify and monetize greenhouse gas emissions associated with the transport of the petroleum products enabled by the construction of the tunnel.⁸⁹ Addressing climate change and abating greenhouse gas emissions has become a policy priority for the Whitmer Administration. Recognizing the existential threat of continued use of fossil fuels and the scientific imperative of adopting a long-term plan to decarbonize the energy system, Michigan joined the United States Climate Alliance in February 2019.⁹⁰ In September 2020, Governor Whitmer issued Executive Order 2020-182 creating the Council on Climate Solutions, finding that “Michigan must take comprehensive, coordinated, and aggressive action” to “combat the climate crisis.”⁹¹ In concert with the Executive Order, Governor Whitmer issued Executive Directive 2020-10, which states in no uncertain terms the consequences of failing to take into account greenhouse gas emissions.

“The science is clear, and message urgent: the earth’s climate is now changing faster than at any point in the history of modern civilization, and human activities are largely responsible for this change. Climate change already degrades Michigan’s environment, hurts our economy, and threatens the health and well-being of our residents, with communities of color and low-income Michiganders suffering most. Inaction over the last half-century has already wrought devastating consequences for future generations, and absent immediate action, these harmful effects will only intensify. But we can avoid some of the worst harms by quickly reducing

⁸⁹ Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances, November 2023

https://www.epa.gov/system/files/documents/2023-12/epa_scghg_2023_report_final.pdf

⁹⁰ United States Climate Alliance,

<https://www.usclimatealliance.org/publications/2019/2/4/michigan-governor-gretchen-whitmer-joins-us-climate-alliance>

⁹¹ Preamble, Executive Order 2020-182, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-540277--

[.00.html#:~:text=Executive%20Order%202020%2D182%3A%20Council%20on%20Climate%20Solutions,-EXECUTIVE%20ORDER&text=The%20science%20is%20clear%2C%20and,largely%20respo](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-540277--00.html#:~:text=Executive%20Order%202020%2D182%3A%20Council%20on%20Climate%20Solutions,-EXECUTIVE%20ORDER&text=The%20science%20is%20clear%2C%20and,largely%20respo)

[nsible%20for%20this%20change.](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-540277--00.html#:~:text=Executive%20Order%202020%2D182%3A%20Council%20on%20Climate%20Solutions,-EXECUTIVE%20ORDER&text=The%20science%20is%20clear%2C%20and,largely%20responsible%20for%20this%20change.)

greenhouse gas emissions and adapting nimbly to our changing environment. “⁹²

State agencies are integrating climatic assessments into their departmental programs. The Michigan Department of Health and Human Services Climate and Health Adaptation Program (MDHHS) in partnership with the Great Lakes Integrated Sciences Assessments Program (GLISA) has issued the *Michigan Climate and Health Profile Report*⁹³ assessing potential climate impacts for the purpose of assisting state and local government in developing climate adaptation plans. MDHHS and GLISA are using the Centers for Disease Control and Prevention’s (CDC) Building Resilience Against Climate Effects (BRACE) framework to evaluate and assess public health related vulnerabilities, disease burden and recommended interventions.

With the enactment of 2016 PA 341, the Commission now requires the consideration of environmental factors including, specifically, greenhouse gas inventories and air toxics in utility integrated resource plans.⁹⁴ Federal courts are now requiring assessments of long-term greenhouse gas emissions in conjunction with oil and gas pipelines and the leasing and development of federal lands and waters.⁹⁵ Given the abundant and growing evidence of the environmental, economic, and public health impacts associated with the development and combustion of fossil fuels and the strong market trends favoring the transition to zero carbon energy generation resources, it is time

⁹² Preamble, Executive Order 2020-10, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-540278--,00.html

⁹³ Cameron, L., A. Ferguson, R. Walker, D. Brown, & L. Briley, 2015: Climate and health adaptation profile report: Building resilience against climate effects on Michigan’s health. <http://glisa.umich.edu/media/files/MI-Climate-Health-Profile.pdf>

⁹⁴ The MPSC developed the [Michigan Integrated Resource Planning Parameters](#) report which provided an inventory of applicable environmental statutes and rules that should be considered in the IRP process.

⁹⁵ See, Institute for Climate Integrity, Pipeline Approvals and Greenhouse Gas Emissions, April 2019 https://policyintegrity.org/files/publications/Pipeline_Approvals_and_GHG_Emissions.pdf

for the MPSC to require applicants for Necessity to demonstrate the public need of their proposed projects and that they advance the public interest.

5. **The Commission failed to consider as part of its “public need” the mandatory constitutional and common law paramount rights and duties imposed on it under Article 4, Section 52 of the Michigan Constitution and as a “sworn guardian” of the public trust waters and bottomlands of the State and its citizens in the Straits and the Great Lakes.**

As stated by Justice Black in *Obrecht*,

“This Court, *equally with the legislative and executive departments*, is one of the *sworn guardians* of Michigan’s *duty and responsibility as trustee* of the above delineated beds of five Great Lakes. Long ago we *committed ourselves* (citations omitted) to the *universally accepted rules of such trusteeship* as announced by the Supreme Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 13 S.Ct. 110, 119, 36 L.Ed. 1018.”⁹⁶

One of the irrefutable historical and legal facts in this proceeding is that the State of Michigan obtained title to the bottomlands and waters of the Great Lakes in public trust on admission to statehood. Enbridge’s proposed corridor tunnel and new tunnel pipeline are subject to the State’s sovereign trust title and the public trust doctrine and law that apply to the Great Lakes and the soils under them. Like all of the states, when Michigan joined the United States in 1837, the State of Michigan took title, absolutely, as sovereign for its citizens under the “equal footing” doctrine to all of the navigable waters in its territory, including the Great Lakes, and “*all of the soils under them*” below the natural ordinary high mark.⁹⁷ The State has a “high, solemn, and perpetual” duty to protect these public trust resources and their associated uses under Michigan’s

⁹⁶ *Obrecht v National Gypsum Co*, 361 Mich 399 (1960); *Glass v Goeckel*, 473 Mich 667; 703 NW2d 58 (2005)

⁹⁷ *Shively v Bowlby*, 14 S. Ct. 548 (1894); *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *State v Venice of America Land Company* 160 Mich 680 (1910)..

public trust doctrine. All of these waters and the soils beneath them are held in and protected by a public trust.⁹⁸ The public trust doctrine means that the state holds these waters and soils beneath them in trust for the public for the protection of preferred or dedicated public trust uses of navigation, fishing, boating, swimming, bathing, drinking water, and other recreation. As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them, unless there is a statute or law that expressly authorizes the proposed disposition, occupancy, or action and the statute contains and requires a consideration that the following standards for the narrow exception to the rule have been duly satisfied:⁹⁹

The United States Supreme Court and the Michigan Supreme Courts have repeatedly held that absent findings of required by public trust law, the conveyance is void from the inception. Absent these findings, the conveyance is not legally warranted or authorized. In *Illinois Central*, the United States Supreme Court identified two narrow exceptions under which such a conveyance is permissible: 1) when the conveyance results in the improvement of the interest thus held; or 2) when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. In *Obrecht*, the Michigan Supreme Court expressly adopted these exceptions, noting that the State must make a “due finding” that one of the exceptions applies in order to “legally warrant the intended use” of state bottomlands. This solemn, perpetual trust is irrevocable.¹⁰⁰ The legislature has expressly shown the extent of the State’s public trust title and inalienable interest by the express broad provisions of the Great Lakes Submerged Lands Act, MCL 324-32502-32508. The legislature recognized this legal fact by prohibiting oil and gas development in

⁹⁸ Id.; see also *Obrecht v National Gypsum*, 361 Mich 399 (1960).

⁹⁹ Id. p. 416.

¹⁰⁰ *Illinois Central R Rd v Illinois; Obrecht v National Gypsum Co.*, *supra*.

or beneath the Great Lakes and bottomlands—oil and gas development include drilling, bore pipes, pipelines, and facilities far beneath the soils of the Great Lakes beneath the lakebed.¹⁰¹

The Commission, having co-regulatory responsibility over the location or siting of utility pipelines and structures in Michigan, is a trustee and “sworn guardian” of the public trust in the Straits of Mackinac and Great Lakes. The cutoff of Act 16 to consider these paramount interests is a breach of the Commission’s solemn duty to consider these paramount public interests as part of its findings on “public need” under Act 16, the MEPA, Michigan Constitution, art. 4, sec. 52 and the common law public trust doctrine.

III. CONCLUSION AND RELIEF

For the reasons set forth in this Brief, Appellant FLOW submits that this Court should grant the following relief:

A. Invalidate and reverse the Commission’s Order and decision on December 1, 2023 as contrary to law or abuse of discretion; or

B. Invalidate and reverse the Commission’s Order December 1 2023 as contrary to law or abuse of discretion and remand the proceeding to the Commission for a hearing on feasible and prudent alternatives on all of Line 5; or

C. Invalidate and reverse the Commission’s Order and decision on December 1, 2023 as contrary to law or abuse of discretion and remand to the case to the Commission to conduct a new hearing on the question of “public need” that accounts for the paramount or vital interests beyond just the need for the construction of the Tunnel Project.

¹⁰¹ MCL 324.32503(1) and 3203(2).

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