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STATE OF MICHIGAN
IN THE SUPREME COURT

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

Supreme Court No. 168335

Court of Appeals No. 369156

MPSC Case No. U-20763

MICHIGAN PUBLIC SERVICE COMMISSION'S BRIEF IN OPPOSITION TO APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

---/

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

BAY MILLS INDIAN COMMUNITY,

Appellant,

v

Supreme Court No. 168336

Court of Appeals No. 369159

MPSC Case No. U-20763

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MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

_____/

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

_____

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Supreme Court No. 168337

Court of Appeals No. 369161

MPSC Case No. U-20763

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Petitioner-Appellee.

_____/

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

_____

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

Supreme Court No. 168338

Court of Appeals No. 369162

MPSC Case No. U-20763

_____/

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

_____

ENVIRONMENTAL LAW & POLICY CENTER and MICHIGAN CLIMATE ACTION NETWORK,

Supreme Court No. 168339

Court of Appeals No. 369165

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Appellant,

MPSC Case No. U-20763

v

MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

_____/

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

_____

MATTHEW S. BORKE,

Supreme Court No. 168342

Appellant,

Court of Appeals No. 369231

v

MPSC Case No. U-20763

MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

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ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

_____/

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5.

_____

FOR LOVE OF WATER, a Michigan nonprofit corporation,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' DISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

_____/

Supreme Court No. 168346

Court of Appeals No. 369163

MPSC Case No. U-20763

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MICHIGAN PUBLIC SERVICE COMMISSION'S BRIEF IN OPPOSITION TO APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

Bay Mills Indian Community, Little Traverse Bay Band of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, Michigan Climate Action Network, For Love of Water, and Matthew S. Borke (Applicants) seek leave to appeal the Court of Appeals' opinion in *In re Application of Enbridge Energy to Replace and Relocate Line 5,* ___ Mich App ___ (2025), 2025 WL 554844, which affirmed the Michigan Public Service Commission's (Commission or MPSC) order in the underlying case, *In the matter of the application of Enbridge Energy, Limited Partnership, for 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 Commission's Rules of Practice and Procedure, R 792.10447, or the grant of other appropriate relief,* MPSC Case No U-20763 December, 2023 Order.

This Court may review appeals "after decision by the Court of Appeals." MCR 7.303(B)(1); MCL 600.215(3). The Commission respectfully asks this Court to deny the Applicants' Application for Leave to Appeal because the application fails to satisfy the criteria for granting leave under MCR 7.305(B).

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Before this Court will grant an application, MCR 7.305(B)(2) (3) and (5) state an appellant *must* show the issue is of significant public interest, involves a legal principle of major significance to the State's jurisprudence, or that the order is clearly erroneous such that it causes material injustice. The Bay Mills Indian Community, Little Traverse Bay Band of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, Michigan Climate Action Network, For Love of Water, and Matthew S. Borke references these rules in passing but devote their application to re-arguing the issues it lost below. Should this Court deny leave where the Applicants failed to satisfy the requirements of MCR 7.305(B)?

   Appellee Michigan Public Service Commission's answer: Yes.

   Appellant Bay Mills Indian Community, Little Traverse Bay Band of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi Environmental Law and Policy Center, Michigan Climate Action Network, For Love of Water, and Matthew S. Borke answer: No.

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STATUTES INVOLVED

MCL 324.1704

324.1704 Granting of relief; administrative, licensing, or other proceedings; adjudication; judicial review.
Sec. 1704.

(1) The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction.

(2) If administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may direct the parties to seek relief in such proceedings. Proceedings described in this subsection shall be conducted in accordance with and subject to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. If the court directs parties to seek relief as provided in this section, the court may grant temporary equitable relief if necessary for the protection of the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction. In addition, the court retains jurisdiction of the action pending completion of the action to determine whether adequate protection from pollution, impairment, or destruction is afforded.

(3) Upon completion of proceedings described in this section, the court shall adjudicate the impact of the defendant's conduct on the air, water, or other natural resources, and on the public trust in these resources, in accordance with this part. In adjudicating an action, the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this part.

(4) If judicial review of an administrative, licensing, or other proceeding is available, notwithstanding the contrary provisions of Act No. 306 of the Public Acts of 1969 pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

MCL 324.1705

324.1705 Administrative, licensing, or other proceedings; intervenors; determinations; doctrines applicable.
Sec. 1705.

(1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

(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

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prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

MCL 324.1706

324.1706 Part as supplement.
Sec. 1706.

This part is supplementary to existing administrative and regulatory procedures provided by law.

MCL 462.26

462.26 Appeal to court of appeals; injunction; equitable powers; preliminary injunction; additional evidence; judgment on amended order or original order; appeal to circuit court; burden of proof.
Sec. 26.

(1) Except as otherwise provided in section 7 of Act No. 299 of the Public Acts of 1972, being section 460.117 of the Michigan Compiled Laws, section 5 of Act No. 246 of the Public Acts of 1921, being section 460.205 of the Michigan Compiled Laws, section 12 of Act No. 165 of the Public Acts of 1969, being section 483.162 of the Michigan Compiled Laws, section 20 of Act No. 19 of the Public Acts of 1967, being section 486.570 of the Michigan Compiled Laws, and except as otherwise provided in this section, any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals. The court of appeals shall not have jurisdiction over any appeal that is filed later than the 30-day appeal period provided for in this subsection.

(2) An appeal of any decision or order of the Michigan public service commission that is pending in the circuit court on the effective date of this subsection shall proceed and be decided in that court and appealed pursuant to the applicable law in effect immediately prior to the effective date of this subsection, if on that date, the appeal has progressed beyond the filing of a complaint and answer. All other pending cases shall be transferred promptly by the circuit court to the court of appeals.

(3) An appeal from any commission order that is filed in a timely manner but is incorrectly initiated in either the circuit court for the county of Ingham or the court of appeals shall be transferred by that court, on its own motion or on motion of a party, to the proper court and shall proceed as if timely filed in that court.

(4) No injunction shall issue except upon application to the court of appeals following notice to the commission and a hearing. The court of appeals shall have the same equitable powers as possessed by the circuit court in chancery in the county of Ingham prior to the effective date of subsection (2).

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(5) Beginning on the effective date of this subsection and until December 31, 1988, and within the time for filing an appeal, a party seeking a preliminary injunction may apply for such relief pursuant to subsection (4) and may request that the court of appeals transfer such application to the circuit court for the county of Ingham. Upon request, the court of appeals shall transfer an application for a preliminary injunction to the circuit court for a determination. The circuit court shall have the same equitable powers as possessed by the circuit court in chancery in the county of Ingham prior to the effective date of this subsection. The circuit court shall grant or deny an application within the time period prescribed by the court of appeals. An order of the circuit court granting or denying an application shall be transferred by that court to the court of appeals and made part of the record in the pending appeal. An appeal of a circuit court order issued under this subsection shall not be necessary to confer upon the court of appeals full and complete jurisdiction to enforce, vacate, or modify an order of the circuit court.

(6) Within 28 days from the filing of an appeal, a party may make application to the commission to present additional evidence. A copy of the application for additional evidence shall be filed in the court of appeals and the court shall stay further appellate proceedings pending the commission's receipt and consideration of the proposed evidence. If the commission finds that the proposed evidence is different from or in addition to the evidence presented at the original hearing, the commission shall receive the additional evidence. After considering the additional evidence, the commission may alter, modify, amend, or rescind its order relating to the rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice, or service complained of, and shall report its decision to the court of appeals within the time period prescribed by the court. If the commission rescinds its order, the appeal shall be dismissed. If the commission alters, modifies, or amends its order, that amended order shall take the place of the original order, and the court of appeals shall render its decision based on the amended order. If the original order is not rescinded or amended by the commission, judgment shall be rendered upon the original order.

(7) An appeal from a commission order pertaining to the application of existing commission rules, tariffs, or rate schedules to an individual customer in a contested case shall be filed in the circuit court for the county of Ingham within 30 days of the issuance and notice of an order.

(8) In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.

MCL 483.1

483.1 Definitions; crude oil, petroleum, or carbon dioxide substances; buying, selling, or transporting; applicability of subsection (2).
Sec. 1.

(1) As used in this act:

(a) "Carbon dioxide substance" means a gaseous or liquid substance, consisting primarily of carbon dioxide, that will be put in storage or that has been or will be used to produce hydrocarbons in a secondary or enhanced recovery operation.

(b) "Commission" means the Michigan public service commission.

(c) "Person" means an individual, partnership, corporation, association, governmental entity, or other legal entity.

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(2) A person exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, by or through pipe line or lines, for hire, compensation or otherwise, or exercising or claiming the right to engage in the business of piping, transporting, or storing crude oil or petroleum, or any of the products thereof, or carbon dioxide substances, or engaging in the business of buying, selling, or dealing in crude oil or petroleum or carbon dioxide substances within this state, does not have or possess the right to conduct or engage in the business or operations, in whole or in part, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment belonging to, or used in connection with that business on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within this state, or have or possess the right of eminent domain, or any other right, concerning the business or operations, in whole or in part, except as authorized by and subject to this act.

(3) Subsection (2) does not apply to a right that exists on March 27, 1929 and is valid, vested, and incapable of revocation by any law of this state or of the United States.

MCL 483.2B

483.2b Minimizing physical impact and economic damage; good faith effort by pipeline company.
Sec. 2b.

A pipeline company shall make a good-faith effort to minimize the physical impact and economic damage that result from the construction and repair of a pipeline.

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INTRODUCTION

The case before the Michigan Public Service Commission centered on Enbridge's proposal to replace a four-mile segment of two 20-inch pipelines crossing the Straits of Mackinac with a new single 30-inch pipeline relocated in a tunnel deep underneath the Straits. According to Enbridge, relocating "the pipeline in the tunnel virtually eliminates the already very small risk of a release from Line 5 impacting the Straits." (Application for authority to replace and relocate the segment of Line 5 Crossing the Straits of Mackinac into a tunnel beneath the Straits of Mackinac, ¶30, p 12.) The Commission's approval of the Tunnel Project is indeed better than the status quo. Much of the current four-mile, dual-pipeline segment rests on supports on the lakebed with no buffer between the pipeline and the water of the Straits other than the pipe's own steel. Replacing the Dual Pipelines with a single pipeline in a tunnel within bedrock underneath the Straits adds secondary containment inhibiting oil from migrating to the Straits if there is a rupture in the pipeline. It also provides a controlled environment in which to house the pipeline and protects the pipeline from outside forces. Staff witness Travis Warner, when evaluating the risk of release from the Dual Pipelines, testified that "the consequences of an unmitigated rupture directly into the Straits could be high. Therefore, the overall risk of the Dual Pipelines continuing to operate is not

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insignificant." (MPSC Case No. U-20763, 12 TR 1729, F#1070.[1]) A potential anchor strike poses the greatest threat to the Dual Pipelines, and Mr. Warner described "the numerous measures that are currently required" to mitigate this and other threats. (MPSC Case No. U-20763, 12 TR 1729–1730, F#1070.)

In the case before the Commission and before the Court of Appeals, all Applicants sought to vastly expand the scope of review under Act 16, MCL 483.1 *et seq*. and the Michigan Environmental Protection Act (MEPA) MCL 324.1701 *et seq*. The Applicants sought to essentially relitigate the entirety of Line 5, which had already received Commission approval, affirmed by the Michigan Supreme Court. After the conclusion of extensive administrative hearings, the Commission issued its final order approving the Replacement Project, subject to conditions, based on competent, material, substantial and relevant evidence on the record below. However, the Applicants appealed that order approving the replacement project to the Court of Appeals alleging, among other things that the Commission's interpretation of MEPA was too narrow and consisted of an asymmetrical, lopsided analysis of proposed alternatives to the Replacement Project with the conduct proposed in Enbridge's application. The Court of Appeals properly rejected this erroneous claim and affirmed the Commission's order.

---

[1] The record in this matter appears in the MPSC's electronic docket found at https://mi-psc.my.site.com/s/case/500t000000UHxxLAAT/in-the-matter-of-the-application-for-the-authority-to-replace-and-relocate-the-segment-of-line-5-crossing-the-straits-of-mackinac-into-a-tunnel-beneath-the-straits-of-mackinac-if-approval-is-required-pursuant-to-1929-pa-16-mcl-4831-et-seq-and-rule-447. "F#" is the filing number where the cited transcript can be found on the e-docket. The Commission has included the F# consistent with MCR 7.212(J)(1)(f).

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The Applicants, being dissatisfied with the Commission's order and Court of Appeals opinion, now attempt to have this Court correct the alleged errors made by the Court of Appeals. This attempt must fail because simply being dissatisfied with the Court of Appeals' decision is not a valid ground for seeking review from this Court. Even if the Court of Appeals erred—which it did not—review by this Court is unwarranted. This Court is not an error-correcting court. *Grames v Amerisure Ins Co*, 434 Mich 867, 874 (1990). The Court of Appeals is, and it found no error. *People v Maxson*, 482 Mich 385, 413 n3 (2008) (identifying the Court of Appeals as an error-correcting court).

And that is the heart of this Application. The Applicants are in short dissatisfied with the outcome in the case below and incorrectly argue that it was decided in error.

The Commission respectfully asks this Court to deny the Applicants' Application for Leave to Appeal.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Commission submits this Counter-Statement of Facts and Proceedings because the Statement of Facts presented by the Applicants is incomplete and inaccurate.

A. Background and Procedural History

1. Enbridge's Line 5 Application

The underlying case in this appeal, *In the matter of the application of Enbridge Energy, Limited Partnership, for 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 Commission's Rules of Practice and Procedure, R 792.10447, or the grant of other appropriate relief,* MPSC Case No U-20763, in simplest terms, is about whether to replace a dual petrochemical pipeline, currently sitting on the bottom of the Straits of Mackinac, into a tunnel purpose-built to house it, and attendant questions about safety, feasibility, necessity, and the proper approvals necessary to engage in and complete the work. The case below commenced with Enbridge's April 2020 application to the MPSC to grant authority to commence the "Line 5" project, or alternatively to find that Enbridge already possessed the authority to proceed with the project.

In defining the "Project," Enbridge asserted that Line 5 is a 645-mile-long interstate pipeline with approximately 4 miles that crosses the Straits underwater, resting on the lakebed. (Application, ¶2. F#0001.) The Project would involve

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relocating this portion of the pipeline that crosses the Straits underground, into a tunnel that would be at various depths below the lakebed. *Id.* The asserted purpose of the project was to "alleviate an environmental concern to the Great Lakes raised by the State of Michigan relating to the approximate four miles of Enbridge's Line 5 that currently crosses Straits of Mackinac." (Application, ¶2. F#0001.) In its application, Enbridge explained further that the contemplated project consists of replacing the dual pipelines with a single pipe, which the Application seeks approval from the Commission to operate, and also all the "associated fixtures, structures, systems, coating, cathodic protection, and other protective measures" and equipment and appurtenances necessary to connect the replacement pipe to existing segments on either side of the Straits of Mackinac. (Application, ¶3. F#0001.) However, the concrete lined tunnel itself would be designed and operated pursuant to the "Tunnel Agreement" entered between the Mackinac Straits Corridor Authority and Enbridge pursuant to 2018 PA 359 and is not part of the Project. In explaining the benefit of the Project, the application stated that "the placement of the pipeline within the tunnel eliminates the possibility of release into the Great Lakes caused by a vessel anchor strike," and that "the pipeline being located underground, within a tunnel and located at a depth of approximately 60 feet to 250 feet beneath the lakebed, will further protect" the lakes against the possibility of a petrochemical release. (Application, ¶6. F#0001.)

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Also in its application, Enbridge referenced its "First Agreement" and "Second Agreement" with the State of Michigan. (Exhibits A-8, A-10; F#0003.) Enbridge described the First Agreement as providing that "the continued operation of Line 5" served important public needs in Michigan by providing propane to Michigan residents and businesses and that the First Agreement was "entered into with the understanding that both parties, Enbridge and the State, contemplated additional measures and further studies related to Enbridge's stewardship of Line 5 within Michigan." (Application, ¶24. F#0001.) The replacement of the dual pipelines was a measure contemplated to address the issues referred to in the First Agreement. The Second Agreement was between Enbridge and the State of Michigan, Michigan Department of Natural Resources (MDNR) and the Michigan Department of Environmental Quality (EGLE) and stated that replacement of the dual pipelines could eliminate the risk of a release from Line 5 into the Straits, and that the parties would pursue further agreements regarding the building of a tunnel to replace the dual pipelines as a feasible alternative for replacing the dual pipelines that could eliminate the risk of adverse impacts that could result from a release or spill into the Straits of Mackinac. (Application, ¶24, 25, 26, 27. F#0001.) In short, the First Agreement resulted in contemplated action to replace the existing Line 5 segments on the lakebed, and the Second Agreement provided the "how"—into a purpose-built tunnel designed to house the replacement pipe. Following this, Enbridge asserted that certain economic benefits might occur from the work related to the project, that the relocation of the pipeline into the tunnel

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protects the aquatic environment of the Straits, and that Enbridge has acquired the necessary property rights to conduct the work in question. (Application, ¶31, 32, 33. F#0001.)

Following these assertions, Enbridge included a request for declaratory relief in its application, stating that as an alternative to approving the Project, the original Commission's approval in 1953 which included "operation and maintenance" of the tunnel "embraces" the scope of the underlying project—replacement of the four-mile segment. (Application, ¶38. F#0001.)[2] As such, Enbridge asserted that the replacement of the four-mile segment into the tunnel falls within the scope of the Commission's prior approval to maintain and operate Line 5, and no further grant of authority to proceed with the project is needed because such authority was already granted via the Commission's 1953 Order. Specifically, the 1953 order found that the construction, operation and maintenance of Line 5 was in the public interest, and that because the proposed Project—the replacement of Line 5 into a tunnel under the bottom of the Straits—consists of

[2] Pursuant to Enbridge's (formerly Lakehead Pipeline Company) 1953 application for approval to construct and operate the pipeline, the Commission found that, "after careful consideration of this matter the Commission finds that the petitioner should be authorized to construct, operate and maintain this line as a common carrier as represented by the applicant." *In the matter of the application of Lakehead Pipe Line Company, Inc. for approval of construction and operation of a common carrier oil pipeline,* MPSC Case No. D-3903-53.1, March 31, 1953, Order, p 9. On May 29, 1953, the Commission issued a supplemental order allowing for the alteration of the engineering design to permit a higher operating pressure. The Commission found that nothing in the petition proposed a change of route, that the issue is one that is entirely of engineering design, and as such not further hearings on the issue were necessary. These Orders are available on the docket in the case below as Exhibit A-3 (F#0003.)

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nothing more than maintaining and continuing the operation of Line 5, the Project "falls squarely within the scope of the Commission's prior approval to maintain and operate Line 5." (Application, ¶¶39, 40. F#0001.) Enbridge asserted further that the Replacement Project was "no different than the replacement of small portions of facilities owned and operated by electric and gas utilities subject to Rule 447 and the Commission has never taken the position that such maintenance-based replacements require Commission approval and should not do so now. (Application ¶41. F#0001.) Therefore, according to Enbridge, seeking specific approval for this project through the filing of an application is unnecessary, and it sought declaratory relief to that effect.

In addition to the request for declaratory relief in its application, Enbridge also filed comments on the case docket on May 13, 2020, asserting as an alternative to the declaratory relief, if the Commission deems that its approval is required, it should not order a contested case but instead grant *ex parte* approval of the application. (F#0089, p 3.)

2. Enbridge's motion in limine and the Commission's order granting, in part, the motion in limine.

Following the Commission's Order setting the case for a contested hearing, Enbridge filed a motion in limine requesting that the Administrative Law Judge exclude six issues from the proceeding and limiting the scope to three issues. The six issues that Enbridge sought to exclude were: "(1) the construction of the utility tunnel, (2) the environmental impact of the tunnel construction, (3) the public need

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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." Enbridge's Motion in Limine, pp 1–2. (F#0296.) Enbridge further sought to limit the scope of the hearing to the following three 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.* In support of its argument for the exclusion of the six issues, Enbridge argued that Act 359 exclusively vests the Mackinac Straits Corridor Authority, and not the Commission with the authority to oversee the construction of the tunnel. *Id.* at 6. Furthermore, Enbridge argued that Act 16 merely vests the Commission with the authority to approve the relocation of the Straits crossing within the tunnel. *Id.* at 7. Additionally, Enbridge argued that the tunnel is not a fixture or equipment appurtenant to the pipeline such that the provision in Act 16, Subsection (2), MCL 483.1(2), stating that a person transporting petroleum products through a pipeline does not possess the right to locate or operate fixtures or related equipment except as authorized by and subject to the Act. Enbridge also argued that another subsection of Act 16, MCL 483.2b, which provides that "A pipeline company shall make a good-faith effort to minimize the physical impact and economic damage that results from the construction and repair of a pipeline" pertains only to a pipeline and not the construction of a tunnel.

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Id. at 10. Therefore, according to Enbridge, the Commission's authority did not extend to the construction of the tunnel. Enbridge also argued that the Michigan Environmental Protection Act (MEPA), is only limited to the environmental impact of the specific conduct at issue in the application. *Id.* at 11. Enbridge also argued that the public need for Line 5 was outside the scope of the proceeding because the Commission, pursuant to the 1953 Orders, had "already granted approval to "construct, operate, and maintain" the pipeline as a "common carrier" and the Michigan Supreme Court had held that the pipeline was "for a public use benefitting the people of the State of Michigan." *Id.* at 13. Enbridge also argued that nothing in Act 16 provides a basis for interference with the current operation of Line 5. *Id.* at 14.

Next, Enbridge distinguished the purpose of its application—"the purpose of Enbridge's application is to provide greater environmental protection to the Great Lakes by relocating the Line 5 Straits crossing in a utility tunnel where the line cannot be touched by anchor strikes"—from certain intervenors' assertions of harm because the Project might delay the transition to cleaner energy sources and impede the efforts to mitigate climate change. *Id.* at 15. Enbridge asserted that Act 16 did not provide the Commission with authority to "deny the approval of the location of a pipeline due to generalized concerns over climate change." *Id.* at 16. Lastly, Enbridge asserted that the Commission had established the scope of Act 16 proceedings as "(A) whether there is a public need for the Project — here, to relocate the Line 5 Straits crossing within a tunnel to protect the Great Lakes; (B) the

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reasonableness of the route for the replacement pipe segment; and (C) whether the construction of the replacement pipe segment will meet or exceed current safety and engineering standards, here, the standards imposed by PHMSA.." *Id.* at 16–17 citing *In re Enbridge Energy Limited Partnership*, MPSC Case No. U-17020, 1/31, 2013, Order, p 5; *In re Wolverine Pipeline Co.*, MPSC Case No. U-13225, 7/23/2002 Order, pp 4–5.

Several intervening parties, including Bay Mills Indian Community, filed a joint response to Enbridge's Motion in Limine arguing that the Commission has authority over the tunnel pursuant to Act 16, that Enbridge was inappropriately attempting to limit the scope of the evidence needed to conduct a MEPA analysis, that risks associated with the continued operation of the entirety of Line 5 in Michigan are within the scope of the case, and that climate change is also a relevant issue in the Commission's analysis of the project. (Joint Response to Enbridge's Motion in Limine, F#0326.)

The Michigan Public Service Commission Staff filed a separate response to Enbridge's Motion in Limine. (F#0328.) In its response, the MPSC Staff explained that the Commission typically reviews Act 16 Applications through the scope of 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. (MPSC Staff's Response, p 4. F#0328.) In addition, the Commission must consider whether the project impairs the environment under the Michigan

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Environmental Protection Act. *Id.* However, Staff also argued that the analysis of these questions should not preclude the Commission's review of the tunnel "which would not be constructed but for the purpose of housing and protecting the pipeline." *Id.* Staff also argued that the tunnel can be characterized as a fixture as referenced in Act 16, Section 1(2) and also a facility involved in the transportation of petroleum pursuant to Mich Admin Code R 792.10447 (Rule 447), and that the Commission must comply with MEPA and perform an environmental review as part of its overall determination. *Id.* at 5. Staff also agreed with Enbridge that issues related to the public need for the entire Line 5, broad environmental impacts including climate change, safety issues involving current operations of the pipeline, and alternatives to current Line 5 operations were not properly noticed, are not pertinent to the Commission's Act 16 review of the Application and are beyond the scope of the case. *Id.* at 6. The Staff also acknowledged that there was significant public interest generated by the proposed project but that "this public interest is not a blanket authorization for parties to relitigate the public need for Line 5 or bog down the proceeding with extraneous material." *Id.* Instead of extraneous issues, Staff stated that the scope of the proceedings should be focused on "material relevant to the Commission's review under Act 16, MEPA, applicable administrative rules, and Commission and court precedent." *Id.*

The Commission issued its order on the ALJ's rulings on the motion in limine, affirming the ALJ's ruling that the issue of the public need for the continued operation of Line 5 was outside the scope of the case, but also asserting that

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testimony and evidence related to greenhouse gas emissions was appropriate to consider within the scope of the case. The Commission first reiterated the statutory parameters of an Act 16 review, the customary three-part test the Commission applies to evaluate Act 16 applications, and the obligation that state agencies must apply MEPA requirements to such decisions. (4/21/21 Order, p 55, F#0713.) The Commission found that:

> in order to grant an application under Act 16, the Commission must find that: (1) the applicant has demonstrated a public need for the proposed pipeline, (2) the proposed pipeline is designed and routed in a reasonable manner, (3) the construction of the pipeline will meet or exceed current safety and engineering standards, and (4) the project complies with the requirements of MEPA. [*Id.* at 57.]

Next, the Commission agreed with the ALJ's explanation of the scope of this case, providing that it was dictated by the activity proposed in the application, and the Commission's jurisdiction over that proposal under Act 16, the administrative rules promulgated under its authority and MEPA. *Id.* at 60. As such, the Commission agreed that "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. *Id.*

Referring to its past orders in other pipeline cases, the Commission explained that its precedent in these cases strongly supports a focus on the need for the particular replacement segment at issue, not a re-evaluation of the entirety of the pipeline or interconnected portions to the portion at issue in the application. *Id.* at

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62. For example, the Commission referred to a past Enbridge case under Act 16 dealing with five non-contiguous segments and found that:

> Finally, in the 2013 order, the Commission examined a proposal under Act 16, filed by Enbridge, to construct, operate, and maintain 110 miles of new 36-inch pipeline, and 50 miles of new 30-inch pipeline, which replaced certain 30-inch pipeline segments on Line 6B. The application sought approval to replace five separate, noncontiguous pipeline segments. 2013 order, p. 2, n. 2. Again, the Commission did not examine the remainder of Enbridge's pipeline system that interconnected with the five proposed segments, nor did it consider the potential lifespan of any part of Enbridge's system including Line 6B. [*Id.*]

The Commission pointed out that the Intervenors' argument to consider portions of the pipeline that were outside the proposed project was a novel and unusual position, stating, "when deciding an application to construct or relocate pipeline, the Commission has never examined any portion of existing pipeline that is interconnected with the segment that is proposed in the applicant's project but not within the proposed route; nor has it examined how the proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system. *Id.* As such, the Commission explained the proper scope is to instead "look[] at whether the applicant has explained the need for the construction or relocation of the segment or segments being proposed and, where alleged, has considered the capacity and safety issues presented by the use of the existing pipeline segment that is proposed for improvement." *Id.* at 62–63. Therefore, the Commission found that the first issue is thus whether there is a public need to carry out the Replacement Project, and does not concern the already approved, existing pipeline "that is merely interconnected with the segment that is the subject of the

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application." *Id.* at 63. Or, put simply, "[t]he public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined." *Id.*

However, regarding the required MEPA analysis, the Commission found that consideration of greenhouse gasses (GHG) as a pollutant were appropriate. *Id.* at 66. Therefore, the Commission found that "GHGs are pollutants within the scope of the clear language of MEPA, and thus the parties are free to introduce evidence addressing the issue of GHG emissions and any pollution, impairment, or destruction arising from the activity proposed in the application. MCL 324.1705(2); MCL 24.272. While the project under consideration is limited to the 4-mile section of the pipeline described in the application, this pipeline section would involve hydrocarbons that may result in GHG pollution that must be subject to MEPA review." *Id.* at 66–67. The Commission reasoned that:

> At this early stage of the proceeding, the Commission is not persuaded that it should prohibit arguments and evidence addressing what the appropriate point of comparison is for any pollution, impairment, or destruction of Michigan's natural resources resulting from the proposed Replacement Project. Such questions on the feasibility and prudence of alternatives – both in terms of alternative pipeline and non-pipeline shipping arrangements and alternatives to the products being shipped – are inherently questions of fact well suited to the development of record evidence. [*Id.* at 68–69.]

Therefore, the Commission largely upheld the ALJ's rulings on Enbridge's motion in limine but provided for evidence and testimony related to GHGs resulting from construction and operation, and from the products transported through the pipeline portion at issue in the Project.

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B. The Commission's December 1, 2023 Order

The Commission found that "[b]ased on a review of this record evidence, the Commission finds that as noted by Enbridge, the Staff, and the Associations, the First, Second, and Third Agreements and Act 359 demonstrate that there is a public purpose and public need to replace the dual pipelines with the Replacement Project." *In re Enbridge Line 5 Application,* MPSC Case No. U-20763, 12/1/2023 Order, p 300, F#1454. In assessing the public need for the Project and in its review of the dangers and triggering events that underlie the Application, the Commission referenced the Dynamic Risk report provided by Enbridge, stating:

> the Principal Threats that were found to contribute to the operating risk on the existing 20-[inch] Straits Crossing segments are, in order of decreasing contribution, anchor hooking, incorrect operations, vortex-induced vibration (VIV), and spanning stress. . . . As shown in Figure ES-4, the dominant threat, representing more than 75% of the annualized total (all-threat) failure probability, is that of anchor hooking caused by the inadvertent deployment of anchors from ships traveling through the Straits. [*Id.* at 293, quoting Exhibit ELP-24, p 28.]

The Commission also reviewed the Commission Staff's analysis, stating that:

> [t]he Staff recognized that, currently, an anchor strike to the dual pipelines poses a risk and requires the implementation of numerous measures to mitigate that risk. The Staff stated that it analyzed the comparative risk of operating the dual pipelines with the Replacement Project, evaluated the Act 16 criterion, and considered the environmental impact of the Replacement Project. The Staff concluded that the Replacement Project meets the public need, is in the public interest, and "is the best option out of the alternatives. [*Id.* at 166–167.]

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Explaining the dangers of maintaining the status quo, the Commission pointed to the Staff's argument that the status quo "leaves the dual pipelines in their current position, which is vulnerable to anchor strikes as was illustrated by the damage that occurred in April 2018 and June 2020."[3] *Id.* at 175. Furthermore, any rupture to the dual pipelines would result in a direct release of natural gas liquids (NGLs) and light crude oils in the waters of the Straits. *Id.* By constructing the tunnel in which to house the replacement pipeline, "[t]he Staff contends that such a review reveals a clear reduction to overall risk, particularly with respect to "anchor hooking, vortex-induced vibration from currents in the Straits, and spanning stress." (Citation omitted.) Additionally, the Staff asserts that if the Replacement Project is constructed, the exterior of the replacement pipe segment can be visually inspected more easily, and the tunnel will offer secondary containment." *Id.* at 281.

The Commission began its discussion of the public need for the Replacement Project by noting the Michigan Supreme Court's 1954 finding that the construction and operation of Line 5, as a whole, was "for a public use benefiting the people of the State of Michigan." *Lakehead*, p 37. Further, as noted in the April 21 order, the Commission reaffirms its finding that "the first issue is whether there is a public

[3] The details of these events are provided in the record testimony at volume 12 TR 1724–1725, F#1070. Regarding the 2018 incident Staff witness Travis Warner explained that "it was determined that the damage to ATC's and Enbridge's infrastructure in the Straits was caused by an anchor from a vessel that was inadvertently dropped and dragged through the Straits" and regarding the June 2020 incident witness Warner explained that "The Enbridge report entitled, "Investigation of Disturbances to Line 5 in the Straits of Mackinac Discovered in May and June of 2020" supports a conclusion that damage was caused by a cable suspended from a surface vessel."

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need to carry out the Replacement Project, a project to replace the dual pipelines with a new pipeline in a tunnel, and does not concern approved, existing pipeline that is merely interconnected with the segment that is the subject of the application. The public need for the existing portions of Line 5 has been determined. The public need for the Replacement Project has yet to be determined." MPSC Case No. U-20763, 4/21/2021 Order, p 63.

After evaluating alternative proposals for the products shipped through the pipeline and considering the risks and alternatives for protecting the environment in the vicinity of the Straits, the Commission concluded that Enbridge had established "both the public need for the products to be shipped through the Replacement Project and the need to relocate the Straits Line 5 segment inside the tunnel, and as such, has established the public need for the Replacement Project." MPSC Case No. U-20763, 12/1/2023 Order, p 305.

Thus, having satisfied the first prong of its three-prong analysis of Act 16 applications—public need—the Commission turned its attention to the other two prongs of the requisite analysis: whether (2) the proposed pipeline is designed and routed in a reasonable manner; and whether (3) the construction of the pipeline will meet or exceed current safety and engineering standards, and found that the proposed project satisfied both of these remaining prongs. *Id.* at 322, 325.

Regarding the MEPA review, the Commission analyzed various alternatives to the Project put forward by the parties. For example, regarding a "no-pipeline" alternative advanced by ELPC and MEC (ELPC's 2/18/2022 Initial Brief, pp 50-51,

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F# 1082; MEC's 3/11/2022 Reply Brief, F# pp 39-40, F# 1105) the Commission found that simply shutting down the pipeline would likely result in an *increase* in GHGs because a shutdown would do nothing to alter the demand for those products which must still be met. The Commission explained:

> Indeed, if the current GHG emissions associated with the product transported by the dual pipelines are compared with the GHG emissions that would be produced following a shutdown of the dual pipelines, the Commission finds that a shutdown would actually result in a significant increase in GHG emissions, at least in the short term, as a shutdown of the dual pipelines would not immediately alter demand for the products shipped on Line 5, and consequently the modes of transportation for crude oil and NGLs would shift to rail and truck. [MPSC Case No. U-29763, 12/1/2023 Order, p 344.]

The Commission noted that the Staff also found that shutting down the pipeline and transporting similar volumes to meet the existing demand would result in "approximately 160% more GHG emissions than the shipment of these products via pipeline." *Id.* at 346; MPSC Case No. U-20763, 12 TR 1792, F#1070.) On the other end of the spectrum, the Commission also found that a no-action alternative was untenable, because "anchor hooking" was determined to be the dominant primary threat . . . that could cause rupture . . . and that in the last five years the dual pipelines have experienced two incidents . . . that could have resulted in catastrophic release of Line 5 products into the Straits." *Id.*

Regarding alternate routes, the Commission found, referencing the Dynamic Risk's Alternatives Report, that the other proposed route "exhibits a greater failure frequency and safety risk when compared to the tunneling alternative." MPSC Case No. U-20763, 12/1/2023 Order, p 338. Similarly, other proposals, such as suspending the pipeline from the Mackinac Bridge, a trenching alternative, and

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others were considered and ultimately found either unfeasible, or exposed the Straits to significant other risks, or imprudent. *Id.* at 337–339. In concluding its analysis, the Commission noted that a rupture of the currently operating dual pipelines would be "catastrophic" for the Great Lakes, result in well over a billion dollars in damages and result in "long-lasting health, environmental, and cultural damages." *Id.* at 347; MPSC Case No. U-20763, 12 TR 1717–17178, F#1070. Therefore, after a thorough MEPA analysis, the Commission found that there are no feasible and prudent alternatives to the Replacement Project. The Commission then approved Enbridge's Application for the Replacement Project

C. The Court of Appeals' February 19, 2025 Opinion

The Court of Appeals affirmed the Commission's December 1, 2023 Order approving the Replacement Project. The Court rejects the Applicants' claim that the Commission erred by granting Enbridge's Motion in Limine, providing:

> We find no basis upon which to reverse the PSC's final order, in light of (1) prior statements made by the PSC (in its April 21, 2021 order), which reflected a finding that the public need for Line 5 had already been established; (2) the incorporation of this April order into the final order; (3) the deferential standard of review to be applied by this Court; and (4) the fact that the PSC did eventually allow evidence regarding the need for Line 5 to be introduced. [*In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App ___ (2025), 2025 WL 554844*18–19.]

Regarding the Commission Act 16 analysis, the Court of Appeals explained that it ordinarily uphold the PSC's interpretations of its own orders so long as the interpretation is reasonable or has support on the record. *Ass'n Businesses Advocating Tariff Equity v Pub Serv Comm,* 219 Mich App 653, 662 (1996). *In re*

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Enbridge, Mich App at 19. Furthermore, "No party argues that the Commission's adopted three-part "test" of need, reasonableness of design and routing, and safety is unreasonable. As such, public need in general was at issue." *Id.* Regarding the establishment of that public need, the Court of Appeals explained, "It is difficult to conclude that the PSC abused its discretion, see *Nat'l Wildlife Federation v Dep't of Environmental Quality*, 306 Mich App 336, 342 (2014), by concluding that the need for Line 5 as a whole was simply not a salient issue in the proceedings because the application was for the Replacement Project, not for the construction of Line 5 as a whole." *In re Enbridge,* Mich App at 20. Regarding the Commission's April Order granting Enbridge's Motion in Limine, the Court noted that "nothing in the Commission's 1953 order set a termination date for the operation of Line 5, and no party disputes Enbridge's legal authority to continue to operate the other 641 miles not at issue in this proceeding." *Id.* at 21. As such, the "already established public need for Line 5 was a piece of the puzzle demonstrating a need for the Replacement Project." *Id.* The Court affirmed the Commission's order, noting that:

> On balance, we conclude that affirmance is appropriate, not only because of the wording of the April order and the deferential standard of review but also because, as will be discussed more fully *infra*, the Commission, despite its ruling on the motion in limine, did in fact end up allowing intervenors the opportunity to present evidence of possible alternatives for Line 5. Moreover, in its analysis of the "public need" issue, the Commission considered the viability of those alternatives. [See *In re Enbridge Energy, Ltd Partnership*, order of the Public Service Commission, entered December 1, 2023 (Case No. U-20763), pp 293–296, 300–302.]

Regarding the Commission's Michigan Environmental Protection Act (MEPA) analysis, the Court first differentiated between the appropriate standard of review

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for direct MEPA claims filed in circuit court as opposed to the Commission's application of MEPA requirements and the Court of Appeals' review of the Commission's order. The Court of Appeals explained that the de novo review in MEPA cases discussed in this Court's holding in *West Mich Environmental Action Council v Natural Resources Comm,* 405 Mich 741 (1979) pertained to MEPA actions filed in circuit court, as opposed to the present case which "is not a separate MEPA action but a MEPA analysis made in the context of a PSC permitting decision." *In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App___(2025), 2025 WL 554844*23. Additionally, the Court of Appeals explained that unlike the circuit courts at issue in those cases, it was not a finder of fact. *Id.* Additionally, in the case below, there was no suit under MPEA in circuit court, which appeared to be the triggering event for the court's de novo review. *Id.* Following this analysis of the requirements of MEPA in the Court of Appeals' review of Commission orders, the Court explained that the proper standard of review was for lawfulness and reasonableness. *Id.*

Following the discussion of the proper standard of review, the Court explained that, in accordance with the plain language of MEPA Section 1705(2), the Commission properly looked to the conduct at issue in Enbridge's Application—the Replacement Project. *Id.* at 24. And based on its review, the Commission "explained why the alternatives [to the conduct] that were presented were not feasible and prudent in its view. *Id.* at 26. The Court concluded that the Intervenors were allowed to provide comprehensive evidence regarding alternatives,

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which the Commission did fully consider, and based on its analysis its decision was supported by the evidence on the record. *Id.* at 26–27. Therefore, the Court of Appeals found that the Commission satisfied both its Act 16 and MEPA requirements and affirmed the Commission's order.

GROUNDS FOR LEAVE AND STANDARD OF REVIEW

An appellant seeking leave to appeal must show that it meets at least one criterion in MCR 7.305(B) before this Court will grant leave to appeal. This Rule provides in relevant part:

> (B) Grounds. The application must show that;
>
> * * *
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity.
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> * * *
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or anther decision of the Court of Appeals …. [MCR 7.305(B)(2), (3), (5).]

In interpreting the application of these rules, the United States Supreme Court held that it is not this Court's responsibility to hear all potentially erroneous lower court decisions, "but to decide matters of larger public import." *Halbert v Michigan*, 545 US 605, 618–619 (2005). Even where error is clear, where "the reviewing court on the entire evidence is left with the definite and firm

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conviction that a mistake has been made," this is not enough. *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 203–04 (2014). The error or issue involved must *also* be substantial, significant, or cause material injustice. *Halbert*, 545 US at 619. This Court will not grant leave to remedy harmless or inconsequential errors. *Id.* With respect to demonstrating that the issue is of major legal significance, this Court has stated that the Commission's statutory interpretations are entitled to respectful consideration and cannot be overturned without cogent reasons. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103 (2008). See also, *Younkin v Zimmer*, 497 Mich 7 (2014).

When considering whether the Court of Appeals' decision was clearly erroneous under MCR 7.305(B)(5), it is important to consider the burden of proof and standard of review it applied. In Section 25 of the Railroad Act,[4] the Legislature identified how MPSC orders are to be reviewed by providing that all rates, classifications, regulations, practices, and services fixed by the Commission are deemed prima facie lawful and reasonable. MCL 462.25. Further, Section 26(8) of the Railroad Act places a heavy burden of proof on an appellant to show by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. MCL 462.26(8).

This Court has explained how difficult it is for an appellant to prove that an MPSC order is unlawful or unreasonable. In *In re MCI Telecommunications*

[4] The Railroad Act is a source of authority under MCL 460.54 and MCL 460.4, which passed authority from the Michigan Railroad Commission to the Michigan Utilities Commission to the Michigan Public Service Commission.

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Complaint, 460 Mich 396, 427 (1999) (quotation omitted), this Court said that to find a Commission order unlawful "there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion." Likewise, "[t]he hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.*

While an appellant always has the burden of proving that a Commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating the appellant's arguments depending on the nature of the agency decision involved. *In re Rovas Complaint*, 482 Mich 90, 108–109 (2008) ("[C]ourts should carefully separate the different agency functions under consideration and apply the proper standard of review for each."). For judicial or quasi-judicial decisions where a hearing is required, the agency's decision must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Dowerk v Twp of Oxford*, 233 Mich App 62, 72 (1998). Even in these "substantial evidence" cases, however, Michigan courts have held that Section 26 of the Railroad Act does not grant courts all of the powers traditionally vested in a court of equity, nor the power to make de novo findings of fact. See *In re Rovas Complaint*, 482 Mich 90, 101 (2008). Rather, a court should not substitute its judgment in place of the Commission's factual findings or regulatory judgment. *Consumers Power Co v Public Service Comm*, 196 Mich App 687, 691 (1992).

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Similarly, the MPSC's legislative or quasi-legislative judgments may not be overturned unless the Commission exceeded its statutory authority or abused its discretion. See *In re Rovas Complaint*, 482 Mich at 100–101; see also *Coffman v State Board of Examiners in Optometry*, 331 Mich 582, 589–590 (1951). Because ratemaking is a legislative function, Courts should defer to the Commission's ratemaking decisions and apply the abuse of discretion standard. See *Detroit Edison Co v Public Service Comm*, 264 Mich App 462, 471 (2004); see also *Coffman*, 331 Mich at 589–590. An abuse of discretion is one that is "outside th[e] range of principled outcomes," and does not occur unless "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 (2005).

ARGUMENT

I. The Applicants fail to meet the grounds articulated in MCR 7.305(B) for granting an application for leave to appeal.

The granting of this Application is not warranted. First, the Court of Appeals applied the proper standard of review. Under the Railroad Act, the Court of Appeals has jurisdiction over appeals filed from the Commission's orders. MCL 462.26(1). And there was no error when the Court of Appeals asserted that for an appellant to be successful, they must demonstrate that the Commission unlawfully abused its discretion in the exercise of its judgement or failed to follow a statutory requirement, or that its decision fell outside a zone of reasonableness. As thoroughly explained in

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the Court of Appeals' opinion, and in the Counter-Statement of Facts and Proceedings, Section C., and the Grounds for Leave and Standard of Review above, there is long-standing precedent regarding the proper standard of review applied in Commission cases, including the Act 16 case at issue below. Importantly, and discussed in detail below, the Court of Appeals explained that the case before the Commission was not a separate MEPA action but an Act 16 case, which involved a "MEPA analysis made *in the context* of a PSC permitting decision." (COA opinion, p 23, emphasis added.) The Court of Appeals applied the correct standard of review.

Furthermore, the Commission and the Court of Appeals properly fulfilled their duties under MEPA in the case below. The Commission focused its MEPA analysis on the conduct at issue in Enbridge's Act 16 Application for the Replacement Project and the Court of Appeals correctly affirmed the Commission's scope of review. Pursuant to the relevant provisions of the Act, the Commission examined the proposed conduct and determined the "alleged pollution, impairment, or destruction" of natural resources and weighed them against the feasibility of alternatives. Based on this analysis, the Commission found that the replacement project was in the public interest and satisfied MEPA.

A. The Applicants allege a false parallel between this case and prior opinions of the Court of Appeals and decisions of this Court.

The Applicants proffer a conflict between prior opinions of the Court of Appeals, holdings of this Court, and the Court of Appeals opinion in the case below. However, there is no conflict. In support of its alleged conflict claim the Applicants

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cite two silos of cases involving MEPA. In the first silo, the Applicants refer to *City of Jackson v Thompson McCully Co, LLC,* 239 Mich App 482 (2000); *Friends of Crystal River v Kuras Props,* 218 Mich App 457 (1996); *Thomas Twp v John Sexton Corp of Mich,* 173 Mich App 507 (1998); *Citizens Disposal, Inc v Dep't of Natural Resources,* 172 Mich App 541 (1988) and *Mich Waste Sys v Dep't of Natural Resources,* 147 Mich App 729 (1985) to argue that these cases require the Court of Appeals to conduct a de novo review in MEPA cases. The Applicants juxtapose these cases against a second silo of cases, where the Court of Appeals applied a "clearly erroneous" standard of review. See *Preserve the Dunes, Inc v Dep't of Environmental Quality,* 264 Mich App 257 (2004); *Cipri v Bellingham Frozen Foods, Inc,* 235 Mich App 1 (1999) *Trout Unlimited, Muskegon White Chapter v White Cloud*, 209 Mich App 452 (1995) and *City of Portage v Kalamazoo Co Rd Comm,* 136 Mich App 276 (1984). The Applicants argue that there is an intolerable dissonance between the respective standards of review applied in the different silos of cases. However, rather than highlighting a conflict in the standard of review between these two groups of cases, what these cases actually demonstrate is that Michigan courts are adept at responding to nuanced fact patterns. Put another way, the Applicants paint with too broad a brush that erases any nuance. The first group of cases deals with circuit court MEPA challenges of agency decisions (most often from the Department of Natural Resources or the Michigan Natural Resources Commission) and the second group of cases comprises largely of private entities and/or local municipalities filing MEPA actions directly in circuit court. In either case, it is *incumbent on the*

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circuit court to engage in a thorough MEPA analysis. Thus, the Court of Appeals in those cases explained that whether the circuit court judge undertook a proper MEPA review of DNR, MDEQ or NRC actions, or applied the relevant statutory provisions themselves in a direct MEPA complaint, the onus was on the circuit court judge to undertake that review and analysis. The Court of Appeals in the case below recognized this, stating:

> We note that in *West Mich Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741, 754; 275 NW2d 538 (1979), the Court referred to de novo review in MEPA cases. This was stated in the context of "an environmental protection act case . . . filed in a circuit court."… In *Friends of Crystal River v Kuras Props*, 218 Mich App 457, 470, 472; 554 NW2d 328 (1996), de novo review was applied by a circuit court in the context of a wetlands permitting decision, and this Court approved of the process. The Court of Appeals, of course, serves a different role from that of a circuit court and is not a finder of fact, and in *Friends of Crystal River*, *id*. at 470, this Court spoke about the circuit court's "finding" regarding the impairment of a natural resource. Also, in *West Mich Environmental Action Council*, 405 Mich at 754, the Court spoke about a circuit court making "findings of fact" under MEPA. (Quotation marks and citation omitted.) The factual circumstances in that case involved a process contemplated by statute, i.e., a circuit court using an administrative tribunal to conduct certain proceedings. See *id*. at 752–754, former MCL 691.1204, and current MCL 324.1704. The *West Mich Environmental Action Council* Court stated that "the Legislature specifically addressed the relationship between suits brought under the environmental protection act and administrative proceedings" and concluded that de novo review by the circuit court was required because of the statutory scheme. *Id*. at 752, 754.
>
> In this case, there was no "suit" under MEPA. We note, too, that in *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8–9; 596 NW2d 620 (1999), the Court spoke about according deference to a *trial court's findings* in a MEPA case. [*In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App ___ (2025), 2025 WL 554844.]

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Additionally, it is important to reiterate that the case below is an Act 16 case and not a MEPA action. "At issue here is not a separate MEPA suit but a MEPA analysis made in the context of a PSC permitting decision." *Id.* at 23. It was not filed in circuit court by any party disagreeing with a Commission decision, nor was any MEPA case filed directly in any circuit court as a way to enjoin any specific conduct by Enbridge. Furthermore, in *West Michigan Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741 (1979), on which the Applicant's rely so heavily, where the Applicant's argue that that case holds that appellate courts must make de novo MEPA determinations, this Court actually stated, after quoting relevant sections of MCL 324.1704 and MCL 324.1705[5], "the above sections provide that *the court in which suit is filed* retains original jurisdiction of the matter" and a mere few sentences later quotes its previous holding in *Ray v Mason County Drain Commissioner*, 393 Mich 294, 307–308 (1975) providing that "in the final analysis the very efficacy of the EPA will turn on how well *circuit court judges* meet their responsibility for giving vitality and meaning to the act through detailed findings of fact." *WMEAC*, 405 Mich at 753–754. (Emphasis added.) Furthermore, this Court explicitly contemplates a different standard of review "once an environmental protection act case has been *filed in circuit court*." *Id.* at 754. These are plain, unambiguous words. It behooves the Applicants to give them their ordinary meaning. The case below was not an environmental protection act case, and it was not filed in circuit court. The case

[5] Formerly MCL 691.1204 and MCL 691.1205.

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below was filed pursuant to Act 16 to remediate a 4-mile-long portion of a pipeline spanning hundreds of miles. And, as explained by the Commission and highlighted by the Court of Appeals,

> "when deciding an application to construct or relocate pipeline, the Commission has never examined any portion of existing pipeline that is interconnected with the segment that is proposed in the applicant's project but not within the proposed route, nor has it examined how the proposed pipeline segment could affect the lifespan of an existing interconnected pipeline system." [*In re Application of Enbridge Energy,* Mich App ___ (2024), 2025 WL 554844, * 13.]

This statement lays bare what the Applicants apparently hope to do: create a first instance where the doors are flung open to reconsider entire existing projects when segments or portions of those projects are under review for remediation. Or, put differently, shift the question of whether the repair/remediation project is a good idea to whether the entire existing pipeline ought to exist or be abandoned. The attempted exponential expansion of the breadth and scope of the case is breathtaking. And it is based on a faulty premise. At its core, while there is no dissonance between the two groups of cases proffered by the Applicants, even if hypothetically there was, the case below is not the appropriate case in which to resolve the manufactured conflict. The Applicant's alleged conflict between *Lakeshore Group v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 341310) and *Preserve the Dunes* again deals with MEPA challenges filed in circuit courts, unlike the case below. The Legislature specifically provided for Commission orders to be appealed to the Court of Appeals, via MCL 462.26(1), unlike other agencies for which appeals are pursued in circuit court in accordance with the provisions of the APA. MCL 24.303(1). The

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Applicants engage in a futile exercise trying to make the case below fit within their purported conflict. It is noteworthy that there is pending circuit court litigation over Line 5 where Attorney General Nessel is pursuing a MEPA claim over the continued operation of Line 5 in its current location. *Nessel v Enbridge Energy, Ltd,* No. 19-474-CE (Ingham Co Cir Ct, 2019). That claim is not dissimilar to the Applicant's claim here. Oral argument on cross motions related to summary disposition of certain claims was held on January 27, 2025, and the parties are awaiting a written decision. In contrast, as stated above, the case below is specifically an Act 16 pipeline case examining the prudence of replacing four miles of a hundreds-of-miles long pipeline, not a MEPA action filed in circuit court.

The Applicants rely on this Court's holding in *WMEAC* to assert a false parallel between that case and the case below. As mentioned above, this Court explained in that case that the plaintiffs specifically filed a MEPA claim in circuit court seeking an order restraining the state from issuing drilling permits following a consent order involving the drilling companies plan to engage in oil and gas exploration and development. 405 Mich 741, 749–750. Furthermore, the plaintiffs explained that the trial court deferred to the DNRs conclusion that no environmental harm would occur for the contemplated drilling. *Id.* at 752. In contrast, the case below was filed pursuant to Act 16 to replace the 4-mile-long segments of pipeline lying on the Straights of Mackinac lakebed to avoid any further anchor strikes or other damage that could cause an immediate release of petrochemicals into the waters of the Straits. There was no plaintiff, and no suit filed pursuant to MEPA in

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a circuit court regarding the conduct contemplated in the Act 16 filing. The Applicants are attempting to shoehorn the case below into a paradigm in which it does not belong. The *WMEAC* Court quoted the language of MCL 324.1704 and a portion of 324.1705 to explain that those "sections provide that the court in which suit is filed retains original jurisdiction of the matter, even if it chooses to remit parties to administrative proceedings." *Id.* at 753. There was no suit filed in court and no court remitted the parties to an administrative proceeding in the case below. The Applicants ask this Court to adopt a different standard of review than what the Court of Appeals applied but ignore this Court's holding that ordinary standards of review are "inapplicable *once* an environmental protection act case has been filed in *circuit court*." *Id.* at 754. (Emphasis added.) Again, the case below was not an "environmental protection act case . . . filed in circuit court" regarding the contemplated conduct in Enbridge's Act 16 application. The Court of Appeals clearly understood the distinction between the cases relied on by the Applicants and the case below, when it explained that the *WMEAC* case was "an environmental protection act case…filed in a circuit court." *In re Application of Enbridge Energy,* Mich App___ (2024), 2025 WL 554844, *23. The Applicant's argument that the Court of Appeals applied the wrong standard of review should be rejected. The Court of Appeals was correct in explaining that it was not a "finder of fact" and that the Commission order must be reviewed for lawfulness and reasonableness. And, as explained in further detail below, the Court of Appeals also found that the Commission properly examined the record in accordance with MEPA.

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B. The Court of Appeals and the Commission properly fulfilled their duties with respect to MEPA in the context of an Act 16 case.

Next, the Applicants appear to try to paint a picture that absent the application of a de novo standard of review, the Commission would otherwise have employed a lack of rigor and thoroughness stemming from a narrow interpretation of MEPA resulting in a material injustice. (Application, pp 24–27.) This attempt at shoehorning the facts and procedure of the case below into one of the grounds for granting an application for leave to appeal, MCR 7.305(B)(5)(a), should fail. The Commission's and the Court of Appeals' interpretation of MEPA was correct, did not improperly narrow the scope of MEPA, and appropriately balanced the conduct at issue in the Replacement Project with the feasibility of proposed alternatives. When speaking of the "enormous environmental consequences," of the Replacement Project (Application, p 24), the Applicants focus on *potential* issues related to the *existence* of the entirety of Line 5. But nowhere do the Applicants focus on the immediate environmental consequence for which the Replacement Project application was filed in the first place: to avoid the catastrophe that would occur if another anchor strike or some other issue caused a rupture in the segments of Line 5 lying on the lakebed of the Straits of Mackinac. The Commission's order, relying on the Environmental Law and Policy Center's Exhibit ELP-24, explained that:

> The Commission reviewed the Alternatives Report and notes that according to Dynamic Risk:
>
> > the Principal Threats that were found to contribute to the operating risk on the existing 20-[inch] Straits Crossing segments are, in order of decreasing contribution, anchor hooking, incorrect operations, vortex-induced vibration

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> (VIV), and spanning stress. . . . As shown in Figure ES-4, the dominant threat, representing more than 75% of the annualized total (all-threat) failure probability, is that of anchor hooking caused by the inadvertent deployment of anchors from ships traveling through the Straits.
>
> [Exhibit ELP-24, p 28; see, 12 Tr 1716; *In re Application of Enbridge to Replace and Relocate Line* 5, MPSC Case No. U-20763, 12/1/2023, Order, p 293. F#1454.]

The threat of another anchor strike is of significant concern and one of the primary driving forces in Enbridge's decision to pursue the Replacement Project. The Commission order highlighted this danger, providing, "Staff Witness Mr. Warner testified that according to Dynamic Risk's Alternatives Report, "'anchor hooking' was determined to be the dominant primary threat to the Dual Pipelines that could cause a rupture," and, quoting witness Cooper's testimony on behalf of the Mackinac Straits Corridor Authority, "the replacement project is important to the State of Michigan because: (1) it will allow Line 5 to continue operating and fulfilling the public need identified in the 1953 order; (2) *it will eliminate the risk associated with a large vessel anchor strike*" (MPSC Case No. U-20763, 12/1/2023 Order, at p 102, 346, emphasis added.) There is a near complete lack of any reference to these dangers in the Applicants' brief.

Furthermore, the Applicants argue essentially that but for the Replacement Project, the pipeline may either be decommissioned or at some undefined point in the future reach the end of its useful life. (Application, pp 27–28.) Yet in the past 5 to 7 years, as explained above, the segment at issue in the Replacement Project has been struck twice by dragged anchors, subject to vortex-induced vibration and

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spanning stress. (12 TR 1724–1725[6], F#1070.) From the Commission's point of view, rolling the dice for the next several years in the face of these risks in the hopes that Enbridge will cease operation of the pipeline in that time is an untenable option: "Furthermore, and most importantly, should the dual pipelines remain in operation, the Commission finds that the "no-action" alternative is not "consistent with the reasonable requirements of the public health, safety, and welfare." (MPSC Case No. U-20763, 12/1/2023 Order, p 346. F#1454.) Yet incomprehensibly, from the beginning of this case the Appellants/Applicants have sought to shift the focus to broad, generalized, "what if" sorts of risks and away from the immediate, specific, and potentially catastrophic risks to the Straits from "anchor hooking, incorrect operations, vortex-induced vibration and spanning stress." The scope of the Commission's MEPA analysis was properly tied to the conduct at issue, which was the replacement project intended to address the very real dangers discussed above. It makes little sense to ignore or sideline those concerns in favor of a broad, generalized and amorphous discussion of potential harms to the environment in the future when the purpose of the Act 16 application and case below is to head off the immediate harm to the Straits before it happens. In, *Buggs v Pub Serv Comm'n*, unpublished opinion per curiam of the Court of Appeals issued January 13, 2015

[6] Regarding the 2018 incident Staff witness Travis Warner explained that "it was determined that the damage to ATC's and Enbridge's infrastructure in the Straits was caused by an anchor from a vessel that was inadvertently dropped and dragged through the Straits" and regarding the June 2020 incident witness Warner explained that "The Enbridge report entitled, "Investigation of Disturbances to Line 5 in the Straits of Mackinac Discovered in May and June of 2020" supports a conclusion that damage was caused by a cable suspended from a surface vessel."

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(Docket nos. 315058 and 315064) (Appendix A), the Court of Appeals, addressing the MEPA analysis imposed on state agencies by *Mich State Hwy Comm v Vanderkloot,* 392 Mich 159, 183–185 (1974),agreed that MEPA analyses must be centered on the conduct at issue, and that future, tangential or unrelated conduct are not pertinent to the conduct triggering the MEPA review. *Buggs* at 9, 10.[7]

In accordance with *Buggs,* the Commission's MEPA analysis centered on the conduct proposed in Enbridge's Act 16 application: the Replacement Project. The Commission considers the application before it, the conduct contemplated by that application and the impact of that conduct. The Commission does not unilaterally or drastically enlarge or alter the scope, meaning, or direction of the application. Absent Enbridge's application to the Commission for the Replacement Project, the status quo would persist—the pipeline would continue to transport petroleum products along the lakebed of the straits, with the unmitigated risks continuing. The only conduct at issue is the conduct proposed.

The Applicants further argue that "nothing in Section 1705(2) of MEPA limits or circumscribes the scope of what should be considered as likely effects." (Application, p 29.) The Applicants' attempt to distend the scope of MEPA beyond the conduct at issue, if successful, would delink the MEPA analysis from the specific

[7] In accordance with MCR 7.215(C)(1), *Buggs v Pub Serv Comm'n* is not precedentially binding but can be helpful in the analysis in the present case because it also addressed a situation, similar to this case, where the appellants sought to include matters well outside the scope of the pertinent issues. As such, the *Buggs* opinion is well-reasoned, and can be persuasive in addressing the narrow MEPA analysis required in this case.

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conduct in the case below, or any other case with MEPA import, and essentially render the party bringing the MEPA claim the arbiter of what is or is not the proper scope of the case. Put differently, if there is no reasonable linkage to the conduct at issue, then there would be no limit to the degree to which increasingly remote effects would have to be considered. To consider far downstream and upstream effects from the actual conduct at issue because a party alleges it "has or is likely to have" an effect is essentially a backdoor for an environmental or other group to challenge the continued existence of any existing project, pipeline, facility, etc., that they do not like. And furthermore, any such operator of a similar project or facility would likely be loath to apply for and initiate repairs, because as here, if the Applicant's prevail, trying to fix four miles of a pipeline could call into question the existence of all 645 miles of it.

In arguing that the Commission's and the Court of Appeals' MEPA interpretation was too narrow, the Applicants allege that when conducting the required alternatives analysis, the Commission failed to make an "apples to apples" comparison between the Replacement Project conduct and the alternatives. (Application, pp 35–36.) The Applicants are wrong. Line 5 already exists. The alternatives do not. In MCL 324.1705, subsections (1) and (2) are centered around the proposed *conduct* that might result in negative environmental consequences. The only conduct at issue in the case below is the replacement project—replacing 4 miles of pipeline out of 645 miles. As mentioned elsewhere in this brief, Enbridge's application was for Commission approval to replace only that portion. Thus, the

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scope of the MEPA analysis was properly focused on that specific, particular *conduct*. Furthermore, MCL 324.1705(2) provides for analysis of "feasible and prudent" alternatives to the proposed conduct that would be "consistent with the reasonable requirements of the public health, safety and welfare." Several of the alternatives proffered by the Applicants and other intervenors in the case below, involved "no-pipe" scenarios, or alternative transportation scenarios which would have essentially replaced the entire Line 5 pipeline.[8] Viewed through the lens of MCL 324.1705(2), the "conduct" involved in those alternatives would be the construction or assembly of entirely new methods by which to transport the products in the pipeline the hundreds of miles that the pipeline currently does. It would fail reason and logic to only evaluate an equivalent, 4-mile portion of those alternatives, and ignore the remainder, and conversely, it fails to reason that the effects of an already existing, operating pipeline should be subject to the analysis as

[8] The alternatives discussed by the Commission included those presented by the Environmental Law &Policy Center in its Exhibit ELP-24 consisting of Dynamic Risk's "Alternative Analysis for the Straits Pipelines" final report can be found on the Commission's website here: https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y000001rATPAA2

Other alternatives assessed by the Commission can be found in Enbridge's Exhibit A-9 found here, beginning on page 143 of 263: https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/068t000000BRSuKAAX

The Commission also considered two additional alternatives proposed by Mackinac Straits Corridor Authority's witness Cooper consisting of suspending a replacement pipe from the Mackinac Bridge or constructing a new suspension bridge to house the replacement segment. (MPSC Case No. U-20763, 12/1/2023 Order, pp 297–298.)

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if it is a new project for which ground has not even been broken yet. Far from "apples to apples," what the Applicants are asking for is an "apples to broccoli" comparison. It would be akin to calling into question the existence of the Brooklyn Bridge because it needed a new suspender cable. Such an attack on already existing infrastructure should not be countenanced.

Furthermore, MCL 324.1706 provides that MEPA is "supplementary to existing administrative and regulatory procedures provided by law." Thus, the application of MEPA in the case below is coextensive with the controlling provision of the case, Act 16. And, as in *Buggs*, future, tangential or unrelated matters far upstream or downstream of the conduct contemplated in the Act 16 application, are not the proper focus of the related MEPA review. And when evaluating MEPA alternatives, the Commission first noted that the analysis is not occurring in a vacuum. As stated previously, absent the application for the replacement project, Line 5 would continue to operate as is. The Commission's analysis was grounded against this fact, providing:

> Mr. Warner contended that if the Commission does not approve the Replacement Project, "the Dual Pipelines would continue operating on the lakebed of the Straits unless and until Enbridge determines to voluntarily cease operations or a legal or regulatory action forces Enbridge to cease operations. Further, the safety benefits and protections of the proposed replacement within a tunnel would not be realized." 12 Tr 1728. [December 1, 2023 Order, p 305. F#1454.]

The MEPA analysis of alternatives properly occurred against this currently existing reality—Line 5 operating as is. Thus, the Replacement Project would address only a 4-mile portion of what is the current status quo. Balanced against this fact, are the effects of the various alternatives proposed by the Applicants and other

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intervenors. For example, the Commission looked at using alternative pipelines and concluded "it is not prudent." (MPSC Case No. U-20763, 12/1/2023 Order, p 338.) Explaining further, the Commission stated:

> As noted by Dynamic Risk, the alternative southern pipeline route would cross 8 rivers, 24 streams, 5 drainage canals, 231 miles of wetlands, 13 protected areas, and 52.9 miles of highly populated areas, and could expose 11 well-head protection areas and two community drinking water well areas to a potential oil spill. See, Exhibit ELP-24, pp. 328, 332. Moreover, as set forth in Dynamic Risk's Alternatives Report, the southern pipeline route exhibits a greater failure frequency and safety risk when compared to the tunneling alternative. [*Id.*]

The Commission found similar issues with several of the other alternatives presented. And, weighed against the option of doing nothing, found that the unmitigated anchor strike risk, and the potential harms of the alternatives far exceeded the relative harms of the Replacement Project and as such were not "feasible and prudent alternative[s] consistent with the reasonable requirements of the public health, safety and welfare." MCL 324.1705. When viewing the Commission's MEPA analysis not in a vacuum, but against the currently existing status quo (which absent Enbridge's application for approval of the replacement project would continue to persist) the Applicants' alleged asymmetry in the comparison between the alternatives and the Replacement Project evaporates. The Commission properly considered the proposed alternatives in the context of its MEPA responsibilities.

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C. This Court should also reject the requests contained in Borke's appeal.

The Court of Appeals' determination regarding Mr. Borke's appeal should not be disturbed. The Court of Appeals correctly surmised that, "Borke merely offered *public comments* in the proceedings below," and that "[a]ny …party in interest cannot include each and every person who happened to offer comments, but nothing more, in a contested case." *In re Application of Enbridge Energy to Replace and Relocate Line 5*, ___ Mich App ___ (2025), 2025 WL 554844*30. The Court of Appeals concluded, "*Hundreds and hundreds* of people, perhaps thousands, offered comments in this case, and this is common for a high-profile case. It is not tenable that each is entitled to an appeal as of right." *Id.*

Even if this Court were to formulate complete arguments from Applicant Borke's filing, the Commission believes that its earlier arguments would be responsive to Mr. Borke's even under the most generous reading of his claims. As this Court has previously stated, "[i]t is not sufficient for a party to 'simply to announce a position or assert a claim of error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203 (1959). See also, *Gross v General Motors Corp*, 448 Mich 147, 161–162 (1995). ("Failure to properly brief an issue on appeal constitutes abandonment of the question.")

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CONCLUSION AND RELIEF REQUESTED

No Applicant has demonstrated any grounds for granting their application for leave to appeal. Their applications are restatements of their arguments before the Court of Appeals. The Court of Appeals decision furthers the public interest by protecting the natural resources of Michigan, specifically the waters of the Straits of Mackinac from the risk of leak from rupture of the dual pipelines of Line 5 lying on the lakebed. The decision does not involve a legal issue of major significance to the state's jurisprudence. Despite the public and media attention, this a standard Act 16 application case. The Commission's decision is consistent with prior Act 16 cases. The Court of Appeals correctly affirmed the Commission's order, and that decision is consistent with prior decisions regarding the proper scope of MEPA. Additionally, the Court of Appeals decision is not clearly erroneous, because it correctly applied the relevant law. Even if this Court were to believe that the Court of Appeals erred, review would still be unmerited as the Applicants have failed to establish any material injustice created by the decision or that the decision is contrary to any decisions by this Court or other Court of Appeals decisions. MCR 7.305(B)(2), (3), (5). The decision affirming the Commission's order is correct on the merits, as is the Court of Appeals acknowledgment of the Commission's application of its customary Act 16 review and the related scope of the MEPA analysis required. The Commission's order is a proper, careful, and correct exercise of this legislatively conferred power and is supported by competent, material and substantial record evidence.

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The Michigan Public Service Commission asks this Court to deny the Applications for Leave to Appeal.

Respectfully submitted,

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WORD COUNT STATEMENT

This **answer in opposition** contains 12,118 words.

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INDEX OF APPENDICES

Appendix	Description
A	*Buggs v Pub Serv Comm'n*, unpublished opinion per curiam of the Court of Appeals issued January 13, 2015 (Docket nos. 315058 and 315064)

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APPENDIX A

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STATE OF MICHIGAN

COURT OF APPEALS

JOHN BUGGS and DANIEL BONAMIE,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

DTE MICHIGAN GATHERING HOLDING COMPANY, assignee of ENCANA OIL & GAS (USA), INC.,

Petitioner-Appellee.

UNPUBLISHED
January 13, 2015

No. 315058
Public Service Commission
LC No. 00-017195

JOHN BUGGS and DANIEL BONAMIE,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

DTE MICHIGAN GATHERING HOLDING COMPANY, assignee of ENCANA OIL & GAS (USA), INC.,

Petitioner-Appellee.

No. 315064
Public Service Commission
LC No. 00-017196

Before: M. J. KELLY, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

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In this dispute over the construction and use of gas pipelines, appellants, John Buggs and Daniel Bonamie, appeal by right the ex parte orders issued by appellee, Michigan Public Service Commission, which gave petitioner, DTE Michigan Gathering Holding Company, as the successor in interest to Encana Oil & Gas (USA), Inc. (Encana Oil),[1] permission to construct, own, and operate two natural gas pipelines: the Garfield 36 Pipeline (Docket No. 315058) and the Beaver Creek 11 Pipeline (Docket No. 315064). For the reasons more fully explained below, we conclude that the Commission's orders were unlawful. Accordingly, we vacate those orders and remand for a new determination of necessity on each application.

I. BASIC FACTS

1. THE GARFIELD 36 PIPELINE

In January 2013, Encana Oil applied for a certificate of public convenience and approval to construct, own, and operate a 1.9 mile long natural gas pipeline under 1929 PA 9 (Act 9), MCL 483.101 *et seq.* Encana Oil referred to the pipeline as the Garfield 36 Pipeline. Encana Oil represented it would use the pipeline to transport gas recovered from a single well with a recoverable reserve of 2 to 3 billion standard cubic feet of gas. However, it also stated that it anticipated drilling additional wells into the Collingwood formation. It stated that the pipeline would be constructed with anticipated easements and permits "adjacent to the well pad access road" on land owned by the Michigan Department of Natural Resources (the Department) and within the county's right of way to the point where it would connect with Michigan Consolidated Gas Company's Saginaw Bay Pipeline. Encana Oil provided a map of the proposed route and engineering specifications which provided that the pipeline would be capable of transporting up to 40 million standard cubic feet of gas per day. Encana Oil further represented that the pipeline was necessary for its business, that the gas would ultimately be available to Michigan consumers, that without the pipeline there would be no public access to gas reserves in that area, and that the pipeline was "the most efficient and cost-effective means to bring these gas reserves to the public."

Encana Oil also filed an environmental impact assessment with its application. Dean Farrier prepared the assessment and stated that he was a consulting biologist. He represented that the proposed pipeline would be constructed entirely on land owned by the Department and along existing corridors such that there would be "minimal impact to the local ecosystems and land use," and that no alternatives reviewed had less impact. He noted that the route crossed some wetlands and that the pipeline would "be directionally drilled under the series of wetlands for 1027 feet" to "minimize the impact to that feature." He represented that the wetland crossing was exempt from the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. Farrier also indicated that clearing would be limited to "the minimum area required for safe and

[1] During the pendency of this appeal, Encana Oil moved to substitute DTE Holding as the party in interest after it assigned all of its interests in the pipelines to DTE Holding. This Court granted the motion. However, because all proceedings below occurred while Encana Oil was still a party, for ease of reference we shall refer to Encana Oil, rather than its successor, DTE Holding.

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efficient construction," and that to the best of his knowledge there were no threatened or endangered species within the proposed easement or along the proposed route. Finally, he represented that underground pipelines were the safest way to transport petroleum products, and that the potential for release was low and, in any event, unlikely to "significantly harm surrounding plants, wildlife, or soils." Further, although the possibility of ignition and fire was a danger, the human population density in the vicinity was "extremely low."

The Commission approved the proposed pipeline project in an ex parte order issued later that same month.

2. BEAVER CREEK 11 PIPELINE

In January 2013, Encana Oil also filed an application for approval and a certificate of public convenience and necessity to construct, own, and operate a 3.1 mile long natural gas pipeline that it referred to as the Beaver Creek 11 Pipeline, which was also to collect gas from the Collingwood formation and connect to Michigan Consolidated Gas Company's Saginaw Bay Pipeline over land belonging to the Department. The pipeline was to service a single well with 2 to 3 billion standard cubic feet of gas but, again, Encana Oil anticipated that it would add "a significant number of wells" in the future. It also again represented that the pipeline was necessary for its business, that without it the public would not have access to gas reserves in the area, and that it was the most efficient and cost-effective means of delivering the gas.

Farrier prepared an environmental impact assessment for this project as well. Farrier again stated that the route was along existing corridors on the Department's land except for a small percentage of the route, which was on land owned by the Department of Transportation; however, he acknowledged that the route crossed privately-owned land and that there were five residences within 1/8th of a mile, but that the route was within the county right-of-way. Again, he represented that to the best of his knowledge there were no threatened or endangered species within the proposed easement or route and that "[c]learing, removal of topsoil, and grading will be limited to the minimum area required for safe and efficient construction." He also said the route "offers the minimal impact to the local ecosystems and land use," and that "[a]lternatives were reviewed and none appeared to have less impact . . . ." As with the other assessment, he asserted that underground pipelines were the safest way to transport petroleum products, that the potential for release was low and unlikely to "significantly harm surrounding plants, wildlife or soils," and that although the possibility of ignition and fire was a danger, the human population density in the vicinity was "extremely low."

The Commission approved the project in an ex parte order issued in January 2013.

The parties do not dispute that both pipelines have since been constructed and have begun transporting gas.

3. PROCEEDINGS

In March 2013, Buggs and Bonamie applied for permission to intervene in both of Encana Oil's applications. Specifically, they asked the Commission to consolidate the proceedings, vacate its previous orders, and hold a hearing to receive additional evidence.

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That same month Buggs and Bonamie appealed in this Court and moved to hold the appeals in abeyance pending a decision by the Commission on whether to allow additional evidence. This Court issued an order consolidating the appeals and issued an order staying appellate proceedings and holding the appeals in abeyance until the Commission "disposes of the petition to receive additional evidence and, if additional evidence is received, issues a final order after consideration of the additional evidence."[2]

In April 2013, the Commission denied the petitions to intervene by Buggs and Bonamie on the ground that they were not proper intervenors:

> Mere interest in a proceeding's outcome is insufficient to support intervention. The Commission has long held that prospective intervenors must generally satisfy the two-prong test established in *Association of Data Processing Services Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970) . . . . This test requires the party in question to show: (1) that it suffered an injury in fact and (2) that the interest allegedly damaged falls within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.
>
> . . . Petitioners have failed to satisfy either criterion. Specifically, Petitioners' allegation that protected wildlife and the environment may be harmed as the result of future drilling does not establish that Petitioners have suffered any concrete or discernible injury in fact. In addition, Petitioners' allegations that the plans interfere with their or the public's future use and enjoyment of the area likewise fail to establish that they suffered an injury in fact or that the "damaged interest" falls within the zone of interests Act 9 was designed to protect or regulate.

The Commission later denied Buggs and Bonamie's motion for reconsideration. In denying reconsideration, the Commission rejected the contention by Buggs and Bonamie that it had an obligation to consider the environmental impact of the proposed pipelines:

> [D]espite the Petitioners' assertion that modern law has "overtaken" Act 9, the Commission is required to apply the law as written. Amendments or additions to the Act must come from the Legislature. The Commission lacks the authority to amend the Act or to expand its reach simply because the Petitioners ask it to. Similarly, contrary to the Petitioners' argument that the Michigan Environmental Protection Act "imposes a duty on the state and on agencies like this commission to consider the likely environmental effects of the proposed conduct," the Commission lacks statutory authority to enforce that law or other environmental laws. Further, the Petitioners have failed to identify any specific duties that the law imposes on the Commission.

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[2] See *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline*, unpublished order of the Court of Appeals, entered March 25, 2013 (Docket Nos. 315058, 315064); *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline*, unpublished order of the Court of Appeals, entered April 3, 2013 (Docket Nos. 315058, 315064).

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> The Petitioners also argue that the Commission Staff's (Staff) failure to investigate Encana [Oil]'s environmental impact assessment (EIA), as compared to the Staff's independent environmental review in Case No. U-9138, warrants reconsideration and approval of the petition. Having reviewed the matter, we conclude that there was no legal error or other basis to warrant reversal of our initial decision denying the Petitioners intervention.
>
> Although the Petitioners are correct that, in Case No. U-9138, the Staff conducted its own environmental review in order to conclude that construction would not constitute a "major site activity," that case has no bearing on the matter presently before the Commission. Moreover, the Petitioners cite no legal authority to support their assertion that, because the Staff conducted an independent review of an issue in one Act 9 pipeline case, it must do so in each case. The criteria that the Commission is statutorily authorized to consider in an Act 9 pipeline construction application includes the map of the proposed line, the route, the type of construction and the necessity and practicability of the pipeline so that the Commission may determine whether the proposed construction serves the convenience and necessity of the public. MCL 483.109.
>
> Here, the Petitioners have chosen the wrong forum in which to bring their claims. If they want to protect the natural habitats of the Kirtland's warbler or other wildlife from diminution, or protect the environment from forest fragmentation, they need to file a lawsuit in a court with proper jurisdiction to consider the issues. The Commission is unable to grant the Petitioners' motion for reconsideration because they have chosen the wrong forum in which to seek redress.

In August 2013, Encana Oil moved to dismiss the appeal by Buggs and Bonamie for lack of jurisdiction. A majority of this Court denied the motion because Encana Oil failed to establish that the Court of Appeals lacked jurisdiction:

> Petitioner's argument that appellants are not parties in interest within the meaning of MCL 462.26 because they were not parties to the . . . [administrative] proceedings must be rejected because, by equating the phrase "party in interest" used in that statutory provision with the term "party," petitioner would improperly render the words "in interest" nugatory or mere surplusage. See, e.g., *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 [NW2d 223] (2013). Rather, by using the broader phrase "party in interest," the Legislature has necessarily allowed persons or entities who are not parties to the relevant [Commission] case to file an appeal of right from the relevant types of [Commission] orders. Further, contrary to petitioner's argument that one needs to be a party to a case to be an aggrieved party under MCR 7.203(A), there are situations where a non-party to a case is an aggrieved party with standing to appeal. See *Abel v Grossman Investments Co*, [302 Mich App 232; 838 NW2d 204 (2013)]. Also, *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006), is inapplicable. Contrary to petitioner's discussion of that case, its holding was not based on the Attorney General not being a named party. See *id*., 296 n 10.

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> Rather, the Attorney General was manifestly not an aggrieved party in that case because he was not pursuing an appeal based on an interest in the outcome of the particular case but merely to dispute this Court's construction of a statute. See *id*., 290. Thus, we need not consider whether *Federated Ins Co* has been undermined by *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). However, we note that review of the June 28, 2013 . . . order is not in the scope of the present appeals from January 31, 2013 orders of the [Commission]. Rather, appellants may only challenge the January 31, 2013 [Commission] orders . . . .[3]

We now consider the issues on appeal.

II. THE ORDERS

A. STANDARDS OF REVIEW

Buggs and Bonamie argue that the Commission erred when it issued the orders approving the pipelines without following the requirements stated under Act 9. Specifically, they maintain that, under Michigan's Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*, the Commission had to conduct an environmental review before making its decision concerning the convenience and necessity of the proposed pipelines, which it did not do. Moreover, they argue, Encana Oil's environmental assessments did not provide a sufficient basis for evaluating the environmental impact. Given these defects, Buggs and Bonamie argue that the Commission should have rejected the applications.

Buggs and Bonamie were not parties to the proceedings below and, for that reason, were not able to raise these issues before the Commission before it issued its orders. Thus, this issue was not properly preserved for review. Nevertheless, this Court has the discretion to consider the issue for the first time on appeal. *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 345; 852 NW2d 180 (2014). And, because this claim of error concerns a question of law and all the

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[3] *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline*, unpublished order of the Court of Appeals, entered September 25, 2013 (Docket Nos. 315058 & 315064). Although Buggs and Bonamie have restricted the issues presented on appeal to those involved in the January 2013 order, they have referred to and incorporated pleadings and documents from subsequent proceedings; they refer to affidavits, pleadings, and documents to establish that they live in the area, were not given notice of the applications, and understand that Encana Oil (or DTE Holding) plans to add 500 to 1,700 wells and associated pipelines to the system. Buggs and Bonamie also state their belief that the gas exploration and development activity can have an extreme effect on the landscape, that the habitat of the Kirtland Warbler will be adversely affected, and relate accounts of dead birds. Because these issues were not before the Commission when it issued its orders, we will not consider them in determining whether the Commission erred when it issued those orders. Nonetheless, the Commission's decision on reconsideration of the denial of the motion to intervene is pertinent to understanding the basis of its refusal to allow intervention.

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facts necessary for our review have been presented by the parties, and because the failure to consider the claim may result in a miscarriage of justice, we elect to exercise our discretion to consider the issue. See *Autodie, LLC v City of Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014).

In order to prevail, Buggs and Bonamie must demonstrate by clear and convincing evidence that the Commission's orders were unlawful or unreasonable. MCL 462.26(8). An order is unlawful if the Commission failed to follow a statutory requirement or abused its discretion. *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010). The Commission's orders must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. This Court reviews de novo whether the Commission exceeded the scope of its authority. *In re Application of Consumers Energy Co*, 291 Mich App at 110. This Court also reviews de novo the proper interpretation of statutes. *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 507; 853 NW2d 481 (2014).

B. ANALYSIS

The Commission is a "creature of the Legislature" possessing only the "authority bestowed upon it by statute"; it "possesses no 'common law' powers." *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). "Thus, a determination of the commission's powers requires an examination of the various statutory enactments pertaining to its authority." *Id.*

The Legislature vested the Commission with the power to control and regulate "corporations, associations and persons engaged, directly or indirectly, in the business of purchasing or selling or transporting natural gas for public use" under Act 9. MCL 483.103. The Commission is further required to "investigate any alleged neglect or violation of the laws of the state by any corporation, association or person purchasing or selling natural gas and transmitting or conveying the same by pipe line or lines for public use . . . ." *Id.*

Anyone proposing to pipe or transport natural gas in Michigan must comply with Act 9. MCL 483.101. Moreover, before constructing a pipeline to transport natural gas, the person proposing to construct the line must apply to the Commission for permission to construct the pipeline. MCL 483.109. The application must include "a map or plat of [the] proposed line or lines which it desires to construct, showing the dimensions and character of such proposed pipe line or lines, its compression stations, control valves, and connections . . . ." *Id.* And the Commission must "examine and inquire into the necessity and practicability of such transmission line or lines and to determine that such line or lines will when constructed and in operation serve the convenience and necessities of the public" before it may approve the construction of the proposed pipeline. MCL 483.109. Thus, although MCL 483.109 does not specifically require the Commission to consider the environmental impact, it plainly permits the Commission to deny permission if after investigating the matter the Commission determines that the new pipeline would not serve the public convenience and necessity.

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Since the enactment of Act 9, our Supreme Court has considered whether an agency must consider the environmental impact of a proposed project before granting permission to proceed. In *State Hwy Comm v Vanderkloot*, 392 Mich 159, 167-168; 220 NW2d 416 (1974) (opinion by Williams, J.), landowners opposed the condemnation of land for a highway, arguing in part that it was a swamp area with "increasingly rare or even unique ecological characteristics," and that the duties of the highway commission conflicted with Const 1963, art 4, § 52, relating to the protection of natural resources. In considering this argument, our Supreme Court held that the Legislature has an affirmative duty to enact legislation to protect the environment, but was not required to fulfill this duty by enactment of a specific provision in the highway condemnation act, MCL 213.361 *et seq.*, or every other piece of relevant legislation; instead, the Court explained, it had fulfilled its duty by enacting the environmental protection act.[4] *State Hwy Comm*, 392 Mich at 182-183 (opinion by Williams, J.), 194 (opinion by Levin, J.) (conceding that the environmental protection act provides substantive protections as well as procedural protections, but declining to consider the issue on the record before the Court). The Court explained that the Legislature accomplished this goal through two distinct methods: it provided a cause of action for the protection of Michigan's natural resources, and it provided that subject agencies had certain environmental obligations. *Id.* at 184. The Court determined that the environmental protection act specifically proscribed "pollution, impairment, or destruction" of natural resources "unless it is demonstrated that 'there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction," and that "[t]his substantive environmental guideline is applicable to the [highway] Commission's administrative condemnation determinations." *Id.* at 185-186 (emphasis removed), citing MCL 691.1203, which has been replaced by MCL 324.1703; see also *Genesco, Inc v Dep't of Environmental Quality*, 250 Mich App 45, 55-56; 645 NW2d 319 (2002). Thus, although the specific provision of the environmental protection act cited by the court addressed the burden of proof for the cause of action created by that act, a plurality of our Supreme Court held that the act also established a substantive standard prohibiting the impairment of natural resources, which applies to an agency's determinations. *State Hwy Comm*, 392 Mich at 186, 190 (opinion by Williams, J.). The Court, however, went on to state that the declaration of necessity in the condemnation proceeding would be *prima facie* evidence of necessity and that a person challenging the agency's determination of necessity would have the burden to prove fraud or abuse of discretion, but that the commission's failure to reasonably comply with its duties could be a basis for finding fraud or an abuse of discretion. *State Hwy Comm*, 392 Mich at 189-190 (opinion by Williams, J.).

[4] The original environmental protection act was repealed by 1994 PA 451, and replaced by the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*, Part 17 of which is titled the Michigan Environmental Protection Act. The MEPA set forth in Part 17 is substantially similar to the original act.

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Buggs and Bonamie argue the Commission did not perform the requisite Act 9 review because, in determining public necessity, it did not sufficiently consider the environmental effect of the pipelines. As noted above, in rejecting the motion for reconsideration, the Commission stated that it had no obligation to consider the environment impact under MEPA, but instead stated that it was required to look to Act 9 alone:

> [C]ontrary to the Petitioners' argument that the Michigan Environmental Protection Act "imposes a duty on the state and on agencies like this commission to consider the likely environmental effects of the proposed conduct," the Commission lacks statutory authority to enforce that law or other environmental laws. Further, the Petitioners have failed to identify any specific duties that the law imposes on the Commission.

The Commission, however, mistakenly characterized the nature of the obligation. Buggs and Bonamie did not ask the Commission to enforce the MEPA or another environmental law. They asked the Commission to comply with its duty to examine and inquire into the necessity and practicability of the pipelines and determine that the pipelines would serve the convenience and necessity of the public. And, under the decision in *State Hwy Comm*, that duty includes an obligation to consider the environmental effect that the proposed pipeline would have. Namely, it had to consider whether the proposed project would impair the environment, whether there was a feasible and prudent alternative to the impairment, and whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. *State Hwy Comm*, 392 Mich at 185-186 (opinion by Williams, J.).

As required by Act 9 itself, Encana Oil submitted applications, maps of the proposed gas lines, and specifications for the projects as required by the statute. The Commission's orders make it clear that it reviewed these materials. Both applications, when coupled with the assessments, indicated that the pipelines were necessary for access to the gas reserves in the Collingwood formation and that the proposed routes were those causing the least impact. Thus, Encana Oil provided proof of necessity and practicability, and that there was no feasible and prudent alternative. However, although the Commission found in a cursory manner that the pipelines would serve the public convenience and necessity, it did not otherwise expressly speak to necessity, practicability, feasibility, or prudence in its orders. Moreover, it did not address whether any impairment was consistent with "the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction." *State Hwy Comm*, 392 Mich at 185 (opinion by Williams, J.). Thus, the Commission failed to follow the substantive requirement of MEPA, a statutory requirement independent of Act 9, and accordingly, its orders were unlawful.

Although MCL 324.1705(2) required a determination that took an environmental element into account, appellants incorrectly suggest that it required the Commission to conduct an independent investigation. There is no language in the statute to suggest that the Commission had any such duty. Moreover, *State Hwy Comm* indicated that the environmental effect of conduct had to be considered in making a determination, but it did not suggest that an agency had an independent duty to investigate. Thus, to the extent that the materials in Encana Oil's applications would allow the Commission to make a determination consistent with Act 9 and

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MCL 324.1705(2), the Commission could base its determination on those materials. In this regard, it is noted that the motions to intervene were not before the Commission at the time it made its determinations regarding Encana Oil's applications. Thus, the allegations in those petitions did not have to be considered. However, Farrier indicated that there would be impairments to natural resources in his environmental impact assessments. He indicated that there would be, among other impairments, clearing of vegetation, but that the route would offer minimal impact because it would be along existing corridors. He further indicated that alternatives were reviewed and none appeared to have less impact. The Commission noted that these environmental assessments had been attached to the applications. However, it did not discuss the contents or expressly adopt Farrier's representation that alternatives were reviewed and none appeared to have less impact, i.e., that there was no feasible and prudent alternative to the impairment, and did not address whether the impairment was consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. *State Hwy Comm*, 392 Mich at 185 (opinion by Williams, J.). Accordingly, it is necessary to remand this case for the Commission to expressly make such a determination.

Buggs and Bonamie argue that Farrier's environmental impact assessments were insufficient to allow the Commission to make the requisite findings required by the MEPA. They claim that the assessments themselves should have caused the Commission to realize that they were inadequate on their face: Farrier analyzed the impact within the proposed easement, but did not include the impact on the environment in the vicinity; Farrier professed not to know of protected or endangered species, but did not certify that there were none; and Farrier claimed to be a biologist, but listed no supporting credentials. They also assert that the assessments were not signed or dated. However, the cover pages bore a date of January 2013 and indicated that they were prepared by Farrier. Buggs and Bonamie cite no authority that speaks to the requisite sufficiency of proofs on which the Commission must base its decision. The assessments described the routes along existing corridors, indicated that to the best of Farrier's knowledge "there were no threatened or endangered species within the proposed easements" or "along the proposed routes," described the clearing that would take place, and represented that the

> workspace will be graded as near as possible to pre-construction contours and/or restored in accordance with Kalkaska County Road Commission permit requirements, and natural runoff and drainage patterns will be restored. All existing improvements, such as fences, gates, bar ditches, and beaver deceivers, will be maintained and repaired to as good as or better than pre-construction conditions. Permanent erosion control measures will be installed, and all disturbed workspace will be reseeded.

Although Buggs and Bonamie's claims that the Kirtland Warbler is protected or endangered and that its habitat would be affected are troubling, allegations to this effect were not before the Commission at the time it reviewed the applications. Moreover, allegations that Encana Oil intended to add more pipelines that would create new corridors would seem to be pertinent to future applications for pipeline approval, but not to the lines at issue. While the Commission might have been inclined to seek more information if cognizant of the requirement that it assess whether there were feasible and prudent alternatives and whether the conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's

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paramount concern for the protection of its natural resources from pollution, impairment, or destruction, the representations made by Farrier in the Assessments were not inherently suspect such that they could not be deemed substantial evidence on the whole record to support the Commission's findings.

III. CONCLUSION

Although the Commission minimally complied with the requirements for approving the applications under Act 9, it failed to follow the independent statutory requirement imposed under MEPA. Because its orders approving the pipelines were unlawfully issued, we vacate those orders and remand for a new necessity determination in both dockets. In making its new determinations of necessity, the Commission shall specifically address the environmental impact as required under the MEPA and the decision in *State Hwy Comm*, 392 Mich at 184-190 (opinion by Williams, J.).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We further order that none of the parties may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter