

Nos. 23-2309 & 23-2467

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF
THE BAD RIVER RESERVATION,
Plaintiff-Appellee, Cross-Appellant,

v.

ENBRIDGE ENERGY COMPANY, INC. AND ENBRIDGE ENERGY, L.P.,
Counter-Plaintiffs, Appellants/Cross-Appellees.

ENBRIDGE ENERGY COMPANY, INC. AND ENBRIDGE ENERGY, L.P.,
Counter-Plaintiffs, Appellants/Cross-Appellees,

v.

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF
THE BAD RIVER RESERVATION AND NAOMI TILLISON,
Counter-Defendants, Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:19-cv-00602-wmc
The Honorable William M. Conley, District Court Judge

BRIEF OF AMICUS CURIAE GREAT LAKES BUSINESS NETWORK
IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT'S BRIEF AND
AFFIRMANCE OF PART AND REVERSAL OF PART OF THE DISTRICT
COURT'S JUDGMENT.

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Appellate Court No: 23-2309, 23-2467

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INTRODUCTION

Amicus curiae Great Lakes Business Network (“Business Network”) represents the interests of over 200 business leaders and small businesses throughout the States of Michigan and Wisconsin.¹ All of them depend on affordable and reliable regional energy supplies. The Business Network, accordingly, is in a unique position to assist the Court in assessing the actual consequences to businesses and consumers from a Line 5 closure. The district court, Enbridge and its amici² make a fundamental error that runs through their entire analysis: they claim that there are no viable alternatives to Line 5 in supplying refineries and consumers with oil and propane. This assumption is demonstrably false, as the Band’s experts and Enbridge’s own experts reveal. A combination of other pipelines, rail, and ports can replace all of Line 5’s oil and propane at competitive (and in places, lower) rates. Consumer prices and jobs will feel virtually no impact from a Line 5 shutdown.

Enbridge Appellants and its amici seek to prevent the decommissioning of Line 5 on the Bad River Band’s Tribal lands, the relief ordered by the district court as a result of Enbridge’s continuing illegal trespass. But the district court ordered that relief to begin only after a three-year period has elapsed. The Bad River Band

¹ No party’s counsel authored this brief in whole or in part. No one other than amicus curiae made a monetary contribution to fund the preparation or submission of this brief. Neither party objects to the filing of this brief.

² The government of Canada, the North American Building Trades Unions et al., the Chambers of Commerce of the USA et al., the American Fuel and Petroleum Manufacturers et al., and the Michigan Propane Association et al.

has cross-appealed and filed a response brief, arguing that the lower court's three-year delay in implementing the injunction against the illegal trespass is unlawful and unjustified. The Business Network files this brief in support of the Band's cross appeal.

The district court based its delay in part on its mistaken conclusion that shutting down Line 5 earlier would cause "economic havoc." Enbridge and its amici in their briefs attempt to support that conclusion with wildly overstated and inaccurate claims that the shutdown of Line 5 on the Band's land will have severe impacts on jobs, consumers, and the regional economy. This brief will set the record straight: the markets will respond to a Line 5 shutdown with alternative transportation routes within months, not years, and indeed are already responding to the prospect of that shutdown.

If the consequences of shutting down Line 5 were as dire as the district court, Enbridge, and its amici say, Business Network members would also be damaged – they would suffer from the energy shortages and price hikes claimed by Enbridge and its amici. But businesses in the Business Network know better. They are not concerned about energy supply or price impacts due to Line 5's closure because they are confident that the supply will continue uninterrupted and that price changes, if any, will be minimal. They are far more concerned about the impact of Line 5's continued operation and risk of rupture to their businesses. These businesses view the continued operation of Line 5 as an existential threat to their business, the

region, and the nation as a whole; one that far outweighs the minimal harm that would arise from shutting down Line 5.

INTEREST OF AMICUS CURIAE

The Great Lakes Business Network is an unincorporated association of businesses and business leaders in the Great Lakes region. The Business Network is “fact-based, non-partisan, and focused on pragmatic advocacy to help set the Great Lakes agenda.”³ The stated goal of the Business Network is “to be the leading business voice for protecting the health and vitality of the Great Lakes and the economy, businesses and communities that depend upon them.”⁴ All of these businesses depend on the purity and quality of the Great Lakes. They are profoundly concerned about the entirety of Line 5 and its likelihood to spill oil into the Great Lakes, specifically including the potential for a rupture in the Bad River, with its potential for contaminating Lake Superior. They are confident that the closure of Line 5 will not have any significant negative impacts on their businesses.

The Business Network has attracted member-businesses from a wide array of industries, all of which are significant to the Michigan and Wisconsin economies. The Business Network has grown from its 11 founding businesses to over 200 member-businesses, including Lake Charlevoix Brewing Company, Short’s Brewing

³ *About GLBN*, Great Lakes Bus. Network, <https://glbusinessnetwork.com/great-lakes-business-network/> (last visited Oct. 2, 2023).

⁴ *Support the Great Lakes Business Network*, Great Lakes Bus. Network, <https://glbusinessnetwork.com/great-lakes-business-network/> (last visited Oct. 2, 2023).

Company, Lakefront Brewery, Patagonia, Bar Fly, Cherry Republic, Keweenaw Mountain Lodge, Sleeping Bear Surf & Kayak, Shepler's Ferry, and Beth Price Photography. Larger member-companies, such as Bell's Brewery, Patagonia, and Cherry Republic, have broad market reach in their respective industries across the region. However, each and every business in the Business Network contributes to the region's rich business economy and many depend on the Great Lakes for survival.

For example, Michigan's and Wisconsin's craft beer industries—including Business Network members Bell's Brewery, Lake Charlevoix Brewing Company, Barrel and Beam, Short's Brewing Company, and Lakefront Brewery—rely on the reputation, marketing, and branding associated with the clean pure water of the Great Lakes. The Great Lakes also provide critical water resources for the brewing process itself. As Richard Bergmann, the owner of the hospitality firm Round Lake Group, Bridge Street Tap Room, and a Business Network member described:

We draw our water from the Charlevoix municipal system, sourced directly from Lake Michigan. Water of the highest quality is what makes it possible for us to succeed and employ 65 people, while helping to build the economic base for Charlevoix and the surrounding area.⁵

Barrel and Beam, a brewery in Marquette, relies on water from Lake Superior to brew its beer. A spill from Line 5 into Lake Superior would not only threaten its water supply, but also its reputation and brand. Bell's Brewery, too, depends on the

⁵ *GLBN Members*, Great Lakes Bus. Network, <https://glbusinessnetwork.com/partners/glbn-members/> (last visited Oct. 12, 2023).

health and vitality of the Great Lakes drive the region's tourism economy which brings visitors to the brewery from near and far, and to help define the company's brand identity and sales in the marketplace. One of its more popular brews is Lager for the Lakes, which it says was "inspired" by the Great Lakes. "[F]resh water is vital in so many ways. . . . The name is intentional: it's a reminder that great beers require clean water."⁶

The health of Lake Superior is of particular concern to many other Business Network members whose businesses would be damaged by a rupture of Line 5 in the Bad River and the resulting oil contamination of the lake. For example, The Keweenaw Mountain Lodge in Copper Harbor, Michigan, situated half a mile from Lake Superior, is a jumping-off place for boating, kayaking and eco- and adventure-tourism on the Lake and the peninsula.

The flooding of the Great Lakes with crude oil when a Line 5 spill occurs will certainly obliterate the business reputation and sales of these essential Michigan and Wisconsin businesses, resulting in untold financial loss and the forfeiture of thousands of jobs.

SUMMARY OF ARGUMENT

Business Network members have spent an enormous amount of time studying the impacts of Line 5 on their businesses, from the economic costs and benefits of Line 5 to its importance to energy supply. We have long concluded that

⁶ *Lager for the Lakes*, Bell's Brewery (June 22, 2023) <https://bellsbeer.com/news/lager-for-the-lakes-bells-new-beer-thats-crisp-refreshing-and-timeless/>.

the costs of keeping Line 5 open—the harm to the Great Lakes and Lake Superior from a rupture—far exceed the costs of shutting it down. We know from expert testimony in the trial and hearings below—including Enbridge’s—that the oil and propane markets will rapidly adjust and energy costs and supplies will not be significantly affected by a Line 5 shutdown.

It is tempting to assume that a major pipeline like Line 5 that has carried oil for 70 years must be critical to energy supplies and that it cannot be easily replaced. Enbridge and its amici play on this assumption throughout their briefs and the district court opinion largely accepted it. But that assumption is flatly contradicted by the evidence—not just the evidence submitted by the Band, but by the admissions of Enbridge’s own experts. That evidence shows that there are readily available alternatives to the oil and NGLs carried by Line 5 and that the markets will adjust quickly—in months and not years—to bring those alternatives online. That evidence means that the District Court abused its discretion by concluding based on clear error that the risk of “economic havoc” compelled it to delay the injunctive relief for three years. And this evidence eviscerates the doomsday scenario painted by Enbridge and its amici about the consequences of shutting down Line 5 even after three more years.

ARGUMENT

I. The district court ignored evidence of market adaptability.

The basis for the district court allowing Line 5 to continue to trespass on the Band’s reservation lands for a full three years is its conclusion that the shutdown of

Line 5 before then “will spark at least temporary shortages and increased prices for refined gas, propane and butane in the Upper Midwest and Eastern Canada, creating hardships, especially for the poor and other economically challenged households.” (A75.) Particularly, the court rejects the “rosy story” told by the Band and its experts that almost all of the oil transported from Line 5 could be replaced within months and calls the Band’s projections “wildly optimistic.” (A95.)

The court simply gets the facts (and thus the story) wrong—which is not surprising given the complex smokescreen of expert testimony from Enbridge. The court completely missed the fact that Enbridge’s experts agreed (albeit often reluctantly) with the key conclusions of the Band’s experts: (a) through a combination of increased waterborne transportation, increased use of another pipeline (Line 78), and increased use of rail, the oil and NGLs carried by Line 5 can be replaced; and (b) the markets can adjust quickly to embrace those alternatives in a matter of months and not years.

A. Alternative modes of conveying oil can quickly offset the loss of Line 5.

Enbridge’s experts acknowledged that virtually all of the 400,000-450,000 barrels per day (bpd) supplied to refineries by Line 5 can be replaced by market forces—almost all within several months: 100,000 bpd in existing excess capacity in another Michigan pipeline, Line 78, that does not transit the Band’s lands;⁷ an

⁷ Earnest Test. Tr., Dkt. 610, 99:11–20; Expert Report of Sarah Emerson, Dkt. 265-1, 24–26 [hereinafter Emerson Report].

additional 63,000 bpd through the expansion of rail;⁸ and 200,000 bpd of oil shipped by waterborne transport to refineries in Montreal, where it would be shipped to other refineries in the region.⁹ According to *Enbridge's* lead expert, those three sources together reduce the shortfall to only 79,000 bpd.¹⁰ Then increase that oil supply by at least 110,000 bpd that Enbridge can add to Line 78 simply by adding pumping capacity (without laying new pipe),¹¹ and the shortfall disappears entirely. Because the refineries supplied by Line 5 now would receive a full complement of oil from other sources, there would be virtually no job loss or energy security concerns.

The lower court misses this agreement of experts entirely, instead making counterfactual (and reversible) errors on each of the critical market responses to a shutdown of Line 5:

Additional transport of oil through Line 78: Again, according to Enbridge's lead expert, Neil Earnest, there is existing excess capacity of 100,000 bpd in another Michigan pipeline, Line 78, that does not transit the Reservation.¹² Yet the District Court calls it "wildly optimistic" because it says that there is "uncontradicted testimony" that the feeder lines to Line 78 are already at capacity and would

⁸ Expert Report of Neil K. Earnest, Dkt. 54, 113–14 [hereinafter Earnest Report]; Earnest Testimony Tr. 99:21–100:3; Emerson Report 14 fig.12.

⁹ Earnest Test. Tr. 91:17–92:2, 130:6–11; Emerson Report 27, 33.

¹⁰ See Earnest Testimony Tr. 103:3–8.

¹¹ Defs.' Objs. and Resps. to Pls.' Fourth Set of Interrogs., Dkt. 399–4, 5 (describing actions needed to expand each segment of Line 78); Expert Rebuttal Report of Graham Brisben, Dkt. 255–1, 51–53 ("The Line 78 expansion would mostly involve increasing the pressure of the pipeline by adding compression (vs. replacing with bigger pipe or twinning the pipeline).") (showing expansion of Line 78A from 570,000 bpd to 680,000 bpd of capacity would allow for full use of downstream pipelines Line 78B, Line 17, and Line 79) [hereinafter Brisben Report].

¹² Earnest Testimony Tr. 99:11–20; Earnest Report 65; see also Emerson Report 24–26.

bottleneck additional flows of oil. (A96.) The court's conclusion is simply baffling. Enbridge's own expert opined that even if the feeder lines are currently at capacity, the apportionment rules that govern which oil flows get priority would prioritize at least an additional 200,000 bpd for Line 78.¹³

Rail transport of oil: The Band also presented evidence that the market would likely respond with a modest amount of rail oil transport through reactivating *existing* rail facilities at the Michigan, Ohio, and Ontario facilities (which already accept some oil by rail).¹⁴ And once again, *Enbridge's* expert agreed that at additional 63,000 bpd of capacity would be reactivated at these refineries if Line 5 shut down.¹⁵

Waterborne transport of oil: Although the district court makes a passing reference to the waterborne transport of oil as a market response, it neither recognizes its importance (200,000 bpd of oil, nearly half of what Line 5 presently transports) or its availability (as testified to by both sides experts). According to *Enbridge's* lead expert, ships could carry an additional 200,000 bpd to refineries in Quebec via the St. Lawrence Seaway and Atlantic ports who already have unloading and storage capacity because those refineries were supplied with that

¹³ Earnest Report 61–62; Earnest Test. Tr. 96:1–21. At trial, one of Enbridge's lay witnesses suggested that the oil that had been carried by Line 5 would not have priority over other crude oil carried by pipelines that supply Line 78 and so no additional oil would be available for Line 78. Samuel Test. Tr., Dkt. 610, 72:15–73:13. But that witness expressly deferred to Enbridge's Mr. Earnest, who confirmed that 200,000 bpd of additional oil would have priority for Line 78. *Id.* at 85:22–25.

¹⁴ Emerson Report 13–14 fig.12.

¹⁵ Earnest Report 54, 113–14; Earnest Test. Tr. 99:211100:3.

quantity of oil prior to 2015.¹⁶ And the record shows that the Quebec refineries have already made contingency plans for waterborne transport of oil so that the shutdown of Line 5 would not affect them.¹⁷ The district court just ignores that evidence. The court's only discussion of this market response was to state—incorrectly—that waterborne transport depended on the reversal of the flow of the Line 9 pipeline. (A95-96.) No expert for either side testified to that effect; the opinion just gets it wrong.

Taken together, existing infrastructure replaces almost all of the oil presently transported by Line 5. Enbridge's expert Earnest agreed that “[i]f the Quebec refineries were, in fact, to go back to waterborne sources of crude oil, then the shortfall in the Line 5 delivery area would be reduced to 79,000 barrels a day[.]”¹⁸ And that is using only existing infrastructure. Enbridge does not dispute that Line 78 could be further expanded with pumping stations (not requiring new pipeline) to carry at least another 110,000 bpd. These market responses would replace virtually all of the Line 5 oil.

¹⁶ Earnest Test. Tr. 91:17–92:2, 130:6–11; *see also* Emerson Report 24 n.42.

¹⁷ Emerson Report 24 (citing Valero spokeswoman in Virginie Ann, *Quebec's Location and Energy Alternatives Give It Options If Line 5 Closes: Expert*, Canadian Press (May 12, 2021), <https://www.bnnbloomberg.ca/quebec-s-location-and-energy-alternatives-give-it-options-if-line-5-closes-expert-1.1603019>) (“We have access to a deepwater port, allowing us to be supplied by ships.”); *see also id.* (quoting Pierre-Olivier Pineau, chair in energy sector management at HEC business school in Montreal, that Quebec refineries could return to their pre- 2015 oil supply chain and be fully supplied by waterborne, rail and other pipelines).

¹⁸ *See* Earnest Testimony Tr. 103:3–8.

Price of gasoline: Although the lower court predicts “economic havoc,” nowhere does the court’s opinion mention the critical uncontroverted evidence on the impact of even an immediate Line 5 shutdown on the price of gasoline: half a penny a gallon in the U.S. and 4-6 cents per gallon in Canada. These are the projections of Enbridge’s main economic expert, Neil Earnest. (BA69-71.) And, as Mr. Earnest recognizes, they are consistent with the historical record. When Line 6B ruptured in 2010, the pipeline shut down for a full two months—with no supply shortages or price spikes. As Enbridge’s Mr. Earnest testified, “[T]here was not . . . sizable price impacts for refined product in the Detroit/Toledo area. And that's consistent with my analysis here regarding a Line 5 shutdown.”¹⁹

**B. Alternative modes of transporting propane can quickly replace
Line 5’s NGLs.**

Line 5 carries 86,000 bpd of NGLs to three fractionators in Superior, WI; Rapid River, MI; and Sarnia, Ontario which produce from it propane used in Wisconsin, Michigan, and Ontario.

¹⁹ Earnest Test. Tr. 610:3–12. Note that Line 5 itself has been shut down with no impact on consumer prices. In 2020, after the discovery that a cable from a passing ship had tangled with the dual lines in the Straits of Mackinac and yanked them and their supports out of alignment at dangerous angles, both lines of the pipeline were completely shut down for 19 days, and one of the lines was shut down for 78 days, cutting Line 5’s capacity by 270,000 bpd during that period. Gasoline prices in Michigan and Toronto actually declined during that period—both in absolute terms and relative to their national averages. See Gary Street, *Column: Gas Price Hikes are Another Enbridge Scare Tactic*, Michigan Advance (June 3, 2023 4:05 PM) <https://michiganadvance.com/2023/06/03/column-gas-price-hikes-are-another-enbridge-scare-tactic/>.

First, for context, nationally the United States exports far more propane than it uses; propane production has doubled to 2 million bpd as domestic use has remained flat at 1 million bpd.²⁰ Line 5's 86,000 bpd of NGLs is tiny in comparison and has no impact on the national market. Alternative supplies could come from a variety of locations: Alberta, the Gulf Coast, the Marcellus/Utica Shale in western Pennsylvania and eastern Ohio, or the American Midcontinent.²¹

The markets served by Line 5 already obtain propane from rail delivery and other pipelines.²² The market response to a Line 5 shutdown will be to transport more propane by those alternatives. And if existing infrastructure does not have enough excess capacity to offset Line 5, new propane infrastructure can quickly be constructed (and as discussed below, is already being constructed). In Wisconsin and Michigan's Upper Peninsula, all that would be required to replace the Line 5 supply are additional propane unloading facilities, either 4-6 mobile transloaders to enable the transfer of propane from rail cars to trucks or storage, or two small permanent facilities. Enbridge's experts testified that the mobile transloaders would cost less than \$1 million each, for a total of \$4-6 million;²³ or alternatively, the two permanent unloading terminals would cost \$5 million each, for a total of \$10 million.²⁴

²⁰ See Expert Rebuttal Report of Jill Steiner, Dkt. 254-1, 20-21.

²¹ Earnest Report 22.

²² Brisben Report 16-17, 40-41 48-49; Earnest Report 34 fig.8 (map showing propane-by-rail terminals in Wisconsin and Michigan).

²³ See Rennie Test. Tr., Dkt. 604, 95:21-24.

²⁴ See Earnest Testimony Tr. 122:23-123:1 (acknowledging that a \$5 million rail facility can enable receipt of enough propane to supply 35,000 homes); Dep't of Env't, Great Lakes, &

This switch from pipeline to rail will have little to no impact on prices. We know this from the market's reaction to the Cochin Pipeline in Wisconsin. Before 2012, that pipeline, with a capacity of 76,000 bpd of propane (approximately the same amount of NGLs carried by Line 5), supplied propane to Wisconsin and other states. In 2012, the owner announced he would reverse the pipeline and thereby completely stop the propane supply. Enbridge's expert acknowledged that by the time the reversal took place in 2014, several new rail facilities had been built and Wisconsin and the Midwest were fully supplied with propane.²⁵ And there was no discernible impact on the price.²⁶

Ignoring the evidence, the district court invents and then dismisses scenarios the Band never proposed in the first place. The lower court decision says that the Band had proposed increased trucking (they didn't) and use of Line 78 to transport NGLs (Line 78 does not transport NGLs and nobody ever suggested it would). (A98.) The opinion compounds its errors by saying it is likely that "current railcars capable

Energy, *Upper Peninsula Energy Task Force Committee Recommendations: Part I – Propane Supply* 1 (2020) (admitted as Trial Ex. 265) (stating that 23,000 households in the Upper Peninsula use propane) <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Groups/UPETF/Report-2020-04-17-Recommendations-Part1-Propane-Supply.pdf?rev=470b36456e154378924c79e58cf139af>.

²⁵ Earnest Report 37–38.

²⁶ See Earnest Test. Tr. 115:20–23; see also Grainger Test. Tr., Dkt. 604, 125:21–126:2; U.S. Energy Info. Admin., *Weekly Wisconsin Propane Residential Price* (2023) (admitted as Trial Ex. 241),

https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=W_EPLLPA_PRS_SWI_DP_G&f=W; RBN Energy LLC, *No Cochin, No Cry – Part 2 – New Infrastructure To Deliver Midwest Propane Supplies* (2014), <https://rbnenergy.com/no-cochin-no-cry-part-2-new-infrastructure-to-deliver-midwest-propane-supplies> (describing \$24 million investment in 5 small rail terminals for unloading propane, which allowed for full transition away from the Cochin Pipeline without impacting consumers).

of carrying NGLs fall short,” (A99), despite the fact that there are over 2,000 unused rail cars capable of carrying propane and butane currently in storage.²⁷ And the opinion conjures false facts, such as mentioning propane fractionating facilities in Detroit and Toledo that do not exist. (A97.)

The trial court record directly contradicts every major element of the district court’s findings on the market response to Line 5’s closure. The district court committed reversible error in using those findings to delay injunctive relief for three years.

II. Enbridge’s and its amici’s doomsday rhetoric is flatly contradicted by reality.

Enbridge and its supporting amici manufacture claims of massive economic harm from the shutdown of Line 5: skyrocketing gasoline and other fuel prices, thousands of jobs lost, major facilities closed, and energy shortages, among other impacts. But their dystopian future is fiction, contradicted by Enbridge’s own experts and the historical record. Here are a few examples of their truly preposterous assertions about the economic impact of shutting down Line 5:

- The Trade Union brief claims that one Toledo refinery (PBF Energy) would have to completely close without Line 5 oil, and that another (Cenovus) would have to substantially close down.²⁸ These claims not only are unsupported—they fly in the face of the directly contrary evidence presented by both

²⁷ Brisben Report 38.

²⁸ Br. North America’s Building Trades Union et al. as Amicus Curiae Supp. Appellants/Cross-Appellees 19–20 [hereinafter Trades Union Brief].

Enbridge and the Band. As noted above, all of the Line 5 oil all can be replaced throughout the system by different pipelines, waterborne transport, and rail. Specific to Toledo, Enbridge's own experts projected only a 13.3% decline in oil to the Toledo refineries without making full use of existing infrastructure,²⁹ which could be negated entirely once that infrastructure is fully used.³⁰

- The Trade Union brief also claims that the Superior Terminal would have to lay off all its workers. Brief at 15. As the Superior Terminal serves 10 pipelines,³¹ it is hard to imagine how removal of one (Line 5) would result in their entire workforce being terminated when the other nine pipelines are still operational.
- Canada says that a Line 5 shutdown would cause “massive revenue losses and potentially significant job losses in ... Alberta and Saskatchewan.”³² But Canada fails to mention that a new expansion of the Transmountain pipeline will come online for the first time in early 2024 and will carry 590,000 bpd of oil—far more than Line 5—from western Canada to revenue-producing markets.³³ Given this huge new demand for oil from those oil fields, it is hard

²⁹ Earnest Report 114.

³⁰ Earnest Test. Tr. 105:16–21 (admitting that full use of existing infrastructure in the Line 5 area would result in “no shortfall in the Detroit/Toledo region”).

³¹ *Superior Tunnel*, Enbridge, <https://www.enbridge.com/projects-and-infrastructure/public-awareness/enbridge-in-wisconsin/superior-terminal> (last visited Oct. 10, 2023).

³² Br. Government of Canada as Amici Curiae Supp. Appellants/Cross-Appellees 9 [hereinafter Canada Brief].

³³ Ismail Shakil & Nia Williams, *Canada Regulator to Make Preliminary Decision on Trans Mountain Expansion Tolls*, Reuters (Oct. 12, 2023, 5:43 PM),

to see how Line 5's shutdown would lead to any revenue or job losses, much less massive ones. Canada neglects to explain why the non-existent losses of revenue and jobs in western Canada are more important than the real revenue and job losses for Great Lakes businesses (including Business Network members) that are certain to be caused by a Line 5 rupture.

- The Chamber makes the ridiculous assertion that Line 5's closure would mean "approximately 3,100 loaded and empty trucks would be added to Wisconsin's roads every day."³⁴ This claim is a complete red herring. There are no credible scenarios where trucks are used to replace a significant amount, let alone all, of the oil and gas from Line 5. None of the Band's experts suggest such a scenario.³⁵
- The Chamber also attempts to equate the gasoline price spikes from the sudden shutdown of the Colonial Pipeline to what would happen if Line 5 were closed.³⁶ The comparison is apples to oranges. The Colonial Pipeline supplies nearly *3 million* bpd of gasoline to gas stations that serve U.S. consumers and was shut down overnight without notice.³⁷ Line 5 carries no

<https://www.reuters.com/article/canada-pipeline-trans-mountain-idCAKBN31C27N>; Nia Williams, *Trans Mountain to Start Line Fill on Canada Oil Pipeline Next Quarter*, Reuters (Oct. 6, 2023, 1:02 PM)

<https://www.reuters.com/markets/commodities/trans-mountain-start-line-fill-canada-oil-pipeline-next-quarter-2023-10-06/>.

³⁴ Br. Chambers as Amici Curiae Supp. Appellants/Cross-Appellees 8 [hereinafter Chamber Brief].

³⁵ Opening and Resp. Br. Bad River Band et al. 81 [hereinafter Bad River Band Brief].

³⁶ Chamber Brief 3–4.

³⁷ *About Us/Our Company*, Colonial Pipeline, <https://www.colpipe.com/about-us/our-company> (last visited Oct. 10, 2023).

gasoline. It transports about 425,000 bpd of hydrocarbons to U.S. refineries that can replace almost all of that oil almost immediately, and which have had three years so far (since the Governor of Michigan terminated Line 5's easement in the Straits of Mackinac and ordered the pipeline to be shut down) to make other plans to do so. As discussed above, Enbridge's own expert projects no significant gasoline price increases³⁸ and when Line 5 was shut down with no warning, gasoline prices did not increase—they actually declined.³⁹

- Canada repeatedly cites an industry-financed report from the Consumer Energy Alliance (CEA) to support their claims of massive job loss, price spikes and energy insecurity.⁴⁰ The CEA report, issued in 2022 before the trial, claimed that a Line 5 shutdown would cause consumer gasoline prices in the Midwest to rise between 9.47% and 11.66% (approximately 30 cents a gallon). But the report is economics at its worst—based on false assumptions, unsupported conclusions, and bias. As noted above, Enbridge's lead economic expert has opined that the increase in Midwest gasoline prices from a Line 5 shutdown would be a penny or less—30 times lower than CEA's wild speculation.

³⁸ *Supra* at 9.

³⁹ *Id.* at n21.

⁴⁰ Canada Brief 7 n.9, 11 n.12.

III. The market is already preparing for a Line 5 shutdown.

Amici and Enbridge repeatedly deny that markets will adjust to the shutdown of Line 5 for many years, if at all. Enbridge and Canada claim that markets will not even begin to adjust because of the uncertainty of whether Line 5 will shut down.⁴¹ The Propane Industry goes farther, saying that market adjustments won't begin until after Line 5 actually shuts down—up to three years in the future.⁴² These claims of course are disproven by market reactions to other supply changes described above. But they also are contradicted by what's happening today regarding Line 5: such adjustments have already begun. Here are a few examples:

- As early as two years ago, shortly after Michigan's governor terminated the easement allowing Enbridge to run Line 5 through the Straits of Mackinac, Michigan propane suppliers like U.P. Propane (serving 14,000 U.P. customers in 14 of 15 U.P. counties) began switching from Line 5 to rail cars, citing the potential closure of Line 5 as their reason.⁴³

⁴¹ *Id.* at 10; Enbridge Brief 46.

⁴² Br. Michigan Propane Gas Association et al. as Amici Curiae Supp. Appellants/Cross-Appellees 20–21 [hereinafter Propane Gas Association Brief]. The Michigan Propane Association claims that the Band in its trial brief recognized that without the completion of a rerouted pipeline around the reservation, the markets would not fully adjust and there would be an “energy shortfall.” Propane Gas Association Brief 17. This misrepresents what the Band's brief said: that no shortfall at all would occur if the markets had 12-18 months advanced notice, regardless of the reroute. As noted throughout this brief, the markets will provide a 1:1 replacement of crude oil and propane within months of a Line 5 shutdown.

⁴³ Zara Ahmad, *Some Michigan Propane Suppliers Switching to Rail Cars in Anticipation of Line 5 Closure*, MLive (Mar. 12, 2021, 12:49 PM), <https://www.mlive.com/public-interest/2021/03/some-michigan-propane-suppliers-switching-to-rail-cars-in-anticipation-of-line-5-closure.html>.

- Private funds and a grant from the state of Michigan also resulted in a multi-million dollar investment to expand propane delivery and storage capacity at a rail terminal in Kincheloe, Michigan in the eastern UP, as part of the state of Michigan's plan, "MI Propane Security: Ensuring Resilience Without Line 5."⁴⁴
- In Wisconsin, Superior Fuel Company, citing a potential Line 5 closure as a reason for its investment, is constructing a new propane by rail terminal.⁴⁵
- Last year, another facility in Kalkasa, Michigan increased the capacity of rail to deliver propane, including 480,000 gallons of propane storage and associated rail and truck facilities.⁴⁶
- The Ambassador propane pipeline in Michigan has been upgraded, enabling it to carry propane in both directions to respond quickly to changes in market supply and demand.⁴⁷
- The oil markets also are adjusting. For example, in May 2023, Canadian National Railway (CN) announced the opening of a new fuel terminal in its

⁴⁴ State of Michigan, *MI Propane Security Plan: Ensuring Resilience Without Line 5* (2021), https://www.michigan.gov/-/media/Project/Websites/mpsc/consumer/propane/MI_Propane_Security_Plan_Overview.pdf?rev=90d4da17bbfb482a96fec64e2201b6c9.

⁴⁵ Brian Richesson, *Superior Fuel Co. Builds Supply Security with New Rail Terminal*, LPGas (Nov. 9, 2021), <https://www.lpgasmagazine.com/superior-fuel-co-builds-supply-security-with-new-rail-terminal/>.

⁴⁶ Brian Richesson, *NGL Supply Wholesale Flows Propane at New Michigan Terminal*, LPGas (May 4, 2022), <https://www.lpgasmagazine.com/ngl-supply-wholesale-flows-propane-at-new-michigan-terminal/>.

⁴⁷ Brisben Report 51–52.

MacMillan Yard to serve the greater Toronto area which will be able to bring in 30,000-45,000 bpd of fuel.⁴⁸

In short, markets are not waiting for the certainty of Line 5's closure; they are adjusting now.

IV. Amici and Enbridge ignore the benefits of an injunction that shuts down Line 5.

When determining whether to impose injunctive relief, courts must generally consider whether: (1) an injunction is necessary to protect against otherwise irreparable harm; (2) remedies available at law are inadequate; (3) a remedy in equity is warranted when balancing the hardships between the plaintiff and defendant; and (4) the public interest would not be disserved by a permanent injunction. *Liebhart v. SPX Corp.*, 998 F.3d 772, 779 (7th Cir. 2021) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Both Enbridge and its supporting Amici repeatedly stress the importance of the public interest prong of the *eBay* test.⁴⁹ As Enbridge notes, "courts weigh the public interest . . . by evaluating 'the consequences . . . to nonparties' from 'granting or denying the injunction.'"⁵⁰ In doing so, courts have "sound discretion" to consider any "necessities of the public interest" when granting injunctive relief, *Hecht Co. v.*

⁴⁸ Doug McDonald, *Sell the Plan: An Integrated Approach to Sustainable, Profitable Growth*, Canadian National Railway Company (2023), <https://www.cn.ca/-/media/Files/Investors/Investor-Day/20230503-Sell-the-plan-EN.pdf?la=en&hash=00B6063496CA85C7499B987C864AC24B96914E3C>.

⁴⁹ See Opening Br. Enbridge Energy Company, Inc. and Enbridge Energy, L.P. 39, 40, 44 [hereinafter Enbridge Brief]; Canada Brief 2; Trades Union Brief 12–13.

⁵⁰ Enbridge Brief 44 (quoting *Abbott Labs. V. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)) (emphasis added).

Bowles, 321 U.S. 321, 329-30 (1944), and they may assess both "the advantages and the disadvantages" of imposing such relief, *U.S. v. Oakland Cannabis*, 532 U.S. 483, 498 (2001). Enbridge and the Amici, however, are ignoring half of that equation. While they certainly lay out (and wildly exaggerate) the disadvantages of the injunction, they do not consider the advantages.

The district court found that, given "the environmental devastation that would result from a pipeline rupture and the recent, precarious conditions at the meander," a "substantial and unreasonable interference with a public right is imminent, if not certain to occur." (A105-06). An injunction that stops a Line 5 rupture would prevent the massive and devastating effects a rupture would have on Lake Superior and the Great Lakes generally, none of which are mentioned by Enbridge and the oil amici. Those effects include major economic impacts. As was discussed before the district court, a Line 5 rupture is the "biggest threat" to the 200 businesses in the Business Network that provide thousands of jobs to the region.⁵¹ Countless other businesses would be devastated by Line 5 rupture. The 45 businesses on Madeline Island, for example, which sit ten miles from the mouth of the Bad River, would be hit severely, and the \$18 million generated on that island alone would be decimated.⁵² Similarly, the commercial fishing fleet industry in Red Cliff would be threatened by a Line 5 rupture, and it would be something that could

⁵¹ Sutherland Test. Tr., Dkt. 670, 187:1.

⁵² Carlson Test. Tr., Dkt. 670, 188:18–20, 189:19–22.

not be recovered for generations to come.⁵³ All these impacts are prevented by a timely injunction.

By law, the benefits of granting the injunction must be considered, and it is clear that the benefits far outweigh the losses when the Great Lakes' economic health is at stake.

V. Enbridge's claims of corporate responsibility and competence are contradicted by its conduct in Michigan.

Enbridge makes claims to this Court that the Band's concerns about Enbridge's willingness and ability to remediate the pipeline as it crosses the Bad River are unreasonable⁵⁴ and asserts that it can reroute the pipeline around the reservation in a safe and effective way.⁵⁵ The Band's brief effectively shows that the pipeline remediation would be unlawful and non-viable, and the Business Network supports those views. In addition, examined in the context of Enbridge's conduct in Michigan and across the region, Enbridge's ability and willingness to complete both proposed projects safely should be viewed with skepticism. Enbridge's track record is replete with dangerous ineptitude and systematic dissembling to government authorities.

Enbridge's overall safety record is abysmal—it has experienced 29 spills totaling over a million gallons of oil released along Line 5's route over the last 50

⁵³ Bainbridge Test. Tr., Dkt. 670, 193:17–23. For comparison, the rupture of Enbridge's Line 6B into Talmadge Creek and the Kalamazoo River cost over \$1 billion to clean up and caused major economic damage. Some businesses have never recovered. See *infra* at 19-20.

⁵⁴ Enbridge's Brief 60–61.

⁵⁵ *Id.* at 11.

years.⁵⁶ Enbridge's response to the Line 6B spill into the Kalamazoo River is instructive. The 2010 Line 6B spill in the Kalamazoo River was made possible by years of corrosion and pipeline neglect permitted by Enbridge that led to a break in Line 6B beneath a major tributary to the Kalamazoo River. As a result, Line 6B spewed more than one million gallons of crude oil into Michigan waterways and cost over \$1 billion to clean up and caused substantial economic damage—making it the costliest land-based oil spill in U.S. history.⁵⁷ More than a decade later, the impact of the Kalamazoo River spill still lingers, and several nearby businesses have never recovered.⁵⁸

Enbridge's operational detection of and response to the spill was appalling. Despite claiming that it had state-of-the-art leak detection technology, including pressure differential alarms that sounded in its headquarters in Alberta, CA, Enbridge never discovered the rupture.⁵⁹ For 17 hours, its operators in Alberta interpreted the pressure differential as a bubble in the pipeline and pumped more

⁵⁶ Jim Malewitz & Craig Mauger, *'History of Failure' Highlights Line 5 Risks Outside Straits of Mackinac*, Bridge Mich. (July 11, 2018), <https://www.bridgemi.com/michigan-environment-watch/history-failure-highlights-line-5-risks-outside-straits-mackinac>; see also *infra* pp. 21–22.

⁵⁷ Sabin Center for Climate Change Law, Columbia Law school, *Kalamazoo River Oil Spill* (May 19, 2015), <https://climate.law.columbia.edu/content/kalamazoo-river-oil-spill#:~:text=It%20was%20the%20largest%20land,%241.2%20billion%20to%20clean%20up.>

⁵⁸ Brad Devereaux, *10 Years Ago, Kalamazoo River Oil Spill Was "an Awakening" in Pipeline Debate*, MLive (Jan. 19, 2021, 6:35 PM), <https://www.mlive.com/news/kalamazoo/2020/07/10-years-ago-kalamazoo-river-oil-spill-was-an-awakening-in-pipeline-debate.html>.

⁵⁹ National Transportation Safety Board, *Pipeline Accident Report: Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release* at xii (2010), <https://www.nts.gov/investigations/AccidentReports/Reports/PAR1201.pdf>.

oil through the line to try to break up the non-existent bubble.⁶⁰ The leak was only discovered when a local utility worker smelled oil in the area and called the local public health authorities.⁶¹ The federal National Transportation Safety Board conducted an investigation and published a report, concluding, “The rupture and prolonged release were made possible by pervasive organizational failures at Enbridge. . . .”⁶²

Enbridge has claimed that it has changed since 2010—that it has a new safety culture and has invested heavily in spill prevention and detection. But Enbridge pipelines experienced 122 incidents between 2011 and 2018. Here are a few of them:

- In 2011, it spilled between 29,400 and 63,000 gallons of oil from its northern Canada pipeline.⁶³
- In 2012, Line 5 spilled 840 gallons in Sterling, Michigan. This was just one of nine spills on Line 5 since 2010, according to a government database.⁶⁴
- In May 2013, a leak at a tank farm in Cushing, Oklahoma resulted in a spill of approximately 2,500 barrels of crude oil. PHMSA determined that “[t]he

⁶⁰ *Id.*

⁶¹ *Id.* at 3.

⁶² *Id.* at xii.

⁶³ *No Coverup in N.W.T. Pipeline Leak: Enbridge*, CBC News (June 7, 2011, 8:29 PM) <https://www.cbc.ca/news/canada/north/no-coverup-in-n-w-t-pipeline-leak-enbridge-1.1029611>.

⁶⁴ Pipeline & Hazardous Material Safety Admin. (“PHMSA”), *Distribution, Transmission & Gathering, LNG, and Liquid Accident and Incident Data*, U.S. Dept. Transp. (last updated June 1, 2022), <https://www.phmsa.dot.gov/data-and-statistics/pipeline/distribution-transmission-gathering-lng-and-liquid-accident-and-incident-data>.

primary cause of the leak was the presence of an undetected internal corrosion defect that extended through the pipe wall and produced a substantial crude oil release that went undetected for almost 24 hours” as a result of an Enbridge operator’s “misinterpretation” of alarm data.⁶⁵

- In October 2018, a pipeline operated by Westcoast Energy, Inc., a subsidiary of Enbridge Inc., exploded near Prince George, British Columbia, with a fireball that resulted in more than 100 people having to leave their homes. An investigation by the Canadian Transportation Safety Board found that the explosion was caused by stress cracks in the pipeline and that a hazard management inspection had been improperly delayed.⁶⁶
- On January 21, 2019, a 30-inch Enbridge gas pipeline ruptured in Noble County Ohio, with the ensuing fire and explosion injuring two residents and burning three homes and two barns.⁶⁷
- On August 1, 2019, an Enbridge Inc. 30-inch natural gas transmission pipeline ruptured and exploded in Danville, Kentucky, resulting in a fireball that caused a fatality, six injuries, nineteen destroyed or damaged houses, and the evacuation of over 75 people. Similarly, the explosion and fire were

⁶⁵ PHMSA, *Failure Investigation Report – Enbridge Cushing Tank Farm* (Feb. 24, 2014), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/safety-reports/17981/enbridge2013-05-17-final-internet.pdf>.

⁶⁶ Pipeline transportation safety investigation P18H008, Canadian Transportation Safety Board, Oct. 9, 2018, <https://www.tsb.gc.ca/eng/rappports-reports/pipeline/2018/p18h0088/p18h0088.html>

⁶⁷ Michael Tatar et al., *UPDATE: Investigation into Pipeline Explosion Could Take Months*, WTOP News (Jan. 21, 2019 12:05 PM), <https://www.wtap.com/content/news/Pipeline-related-fire-reported-in-Noble-County-504652651.html>.

caused by degraded coating and cracking of the pipeline. The National Transportation and Safety Board (NTSB) determined that Enbridge's integrity management system had failed.⁶⁸

- In one two-month period in 2021, Enbridge caused twenty-eight spills of drilling fluids in quantities as high as 9,000 gallons as it reconstructed Line 3 in Minnesota – one in a river, thirteen in wetlands, and the rest on land.⁶⁹

Even within the Straits of Mackinac, where there has been intense scrutiny from Michigan agencies, the public, and Enbridge itself, Enbridge continues to bungle its operations. Enbridge admitted in 2020 that its own vessels were likely responsible for a cable dragged across the underwater pipeline that damaged the line and resulted in a court ordering the pipeline temporarily shut down.⁷⁰ In 2021, a 7-ton anchor was dropped and abandoned by Enbridge between the dual pipelines,

⁶⁸ NTSB, *Enbridge Inc. Natural Gas Transmission Pipeline Rupture and Fire* vii-viii (Aug. 1, 2019), <https://www.nts.gov/investigations/AccidentReports/Reports/PIR22002.pdf>.

⁶⁹ Rilyn Eischens, *Enbridge Line 3 Drilling Fluids: What We Know So Far*, Minnesota Reformer (Aug. 16, 2021, 6:00 AM), <https://minnesotareformer.com/2021/08/16/enbridge-line-3-drilling-fluid-spills-what-we-know-so-far/>.

⁷⁰ Enbridge, *Investigation of Disturbances to Line 5 in the Straits of Mackinac Discovered in May and June of 2020* 8 (last updated August 21, 2020); see also Laina G. Stebbins, *New: Coast Guard Concludes Line 5 Damage Caused by Enbridge Vessels, Denies Anchor Ban Request*, Mich. Advance (Sept. 8, 2020, 12:58 PM), <https://michiganadvance.com/2020/09/08/new-coast-guard-concludes-line-5-damage-caused-by-enbridge-vessels-denies-anchor-ban-request/>.

retrieved by Enbridge only after a state demand.⁷¹ That same year another Enbridge vessel collided with a support structure of the Mackinac Bridge.⁷²

The Band's mistrust of Enbridge is well-founded. It was entirely reasonable for the Band not to renew an easement across its sovereign land for a company with this track record. It is also entirely reasonable for the Band to have voiced opposition to Enbridge's proposed reroute, which comes as close to the reservation as possible and remains in the Bad River watershed.

CONCLUSION

For the foregoing reasons, the Great Lakes Business Network respectfully requests that this Court affirm the district court's granting of an injunction against Enbridge's illegal trespass on the Band's reservation lands and grant the Band's request that the injunctive relief—the shutdown of Line 5—be implemented within six months and not three years.

Respectfully submitted,

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⁷¹ Garret Ellison, *Enbridge Ordered to Remove 7.5-ton Anchor Left Near Line 5*, MLive (July 26, 2021, 1:50 PM) <https://www.mlive.com/public-interest/2021/07/enbridge-ordered-to-remove-75-ton-anchor-left-near-line-5.html#:~:text=MACKINAW%20CITY%2C%20MI%20%E2%80%94%20The%20state,under%20the%20Straits%20of%20Mackinac>.

⁷² Garret Ellison, *Enbridge Contract Boat Crashed into Mackinac Bridge, Authorities Say*, MLive (Nov. 12 2021, 12:31 PM), <https://www.mlive.com/public-interest/2021/11/enbridge-contract-boat-crashed-into-mackinac-bridge-authorities-say.html>.

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Respectfully submitted,

October 17, 2023

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I certify that on October 17, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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