
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.,
Defendants-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.

Appeal from the United States District Court for the Western District of Wisconsin,
No. 3:19-cv-602 (Hon. William M. Conley)

**BRIEF FOR CHAMBERS AS AMICI CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS
AND REVERSAL IN PART**

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2309 & 23-2467

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America, the Canadian Chamber of Commerce, Wisconsin Manufacturers and Commerce, the Michigan Chamber of Commerce, and the Ohio Chamber of Commerce (collectively, the “Chambers”) submit this brief in support of Enbridge Energy Company, Inc. and Enbridge Energy, L.P.

The Chambers and their members have a strong interest in the continued operation of this interstate, cross-border petroleum pipeline. The problem reaches beyond the small pipeline segment at issue in this case. Although the current litigation is ostensibly about a 12-mile segment, the entire pipeline—known as Line 5—would likely need to be shut down if the Plaintiff prevails here.

Line 5 begins in Superior, Wisconsin. From there, it carries a daily 23 million gallons of crude oil and natural gas liquids along Wisconsin’s northernmost countryside into Michigan’s upper peninsula. Buried beneath the waters of the Mackinac Straits, Line 5 then runs down Michigan’s lower peninsula and into Ontario, Canada.

Even a temporary shutdown of the pipeline would carry tremendous negative consequences for the Chambers’ members and the economies of the United States and Canada, who all rely on that supply of oil and natural gas liquids. The Chambers urge this Court to consider the severe impact of any disruption in energy supply and

distribution, as those consequences would extend to the North American economy and its energy security.¹

DISCUSSION

I. Interstate pipelines supply the United States and Canada with vital resources and enable energy security.

“If America’s energy supplies are the lifeblood of our economy, then we can think of pipelines as something like the nation’s circulatory system.”² People depend upon pipelines to reliably deliver the energy that powers their lives and livelihoods. In the United States, pipelines bring “about 90% of our petroleum and virtually all of our natural gas — which is pretty significant, given that those two power sources alone make up about 70% of the country’s entire energy use.”³ “Due to their high capacity and economies of scale, pipelines are the most economic transportation mode for shipping most gaseous and liquid commodities.”⁴ Without pipelines, producers are forced to rely on more expensive methods of transporting fuel to power generators or consumers—or forego production entirely.⁵

¹ All parties have consented to the filing of this brief. No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amici curiae*, their members, or their counsel has contributed or will contribute money that was intended to fund preparing or submitting this brief.

² *Pipe Dreams: How America Gets Energy*, KITEANDKEYMEDIA.COM, April 2022, <https://www.kiteandkeymedia.com/videos/how-oil-petroleum-natural-gas-pipelines-support-american-energy-demands-keystone-xl-infrastructure/>.

³ *Id.*

⁴ Paul Parfomak, R46700, Pipeline Transportation of Hydrogen: Regulation, Research, and Policy 5, Congressional Research Service (Mar. 2, 2021).

⁵ See John Frittelli et al., R43390, U.S. Rail Transportation of Crude Oil: Background and Issues for Congress 4, Congressional Research Service (Dec. 4, 2014).

The United States has one of the most advanced and complex energy infrastructures in the world, with nearly 2.6 million miles of pipeline. This network, and the ability to operate it smoothly, is profoundly important to our national economy and our national energy security.⁶ Since 2010, the Midwest region has increased its imports of propane by 63%, supplying propane to the southern and eastern United States.⁷ The U.S. Department of Energy identifies supply loss to refineries in the Midwest as a vulnerability or threat to energy supplies to many states, including Michigan, Ohio, and Wisconsin.⁸ The interconnected nature of the gas pipeline network means that the entire network’s resiliency and reliability is destabilized when capacity is limited.

Lack of capacity can mean consumers are forced to spend more on energy costs. For example, customers in New England pay “400% more for natural gas” due to repeated opposition to new pipeline projects, which has limited capacity and has forced the region to rely on imported natural gas subject to international pricing.⁹

⁶ U.S. Department of Energy, Valuation of Energy Security for the United States: Report to Congress 2, 12 (Jan. 2017), <https://bit.ly/3JtSEiI>.

⁷ PUBLIC SECTOR CONSULTANTS, PREPARED FOR MICH. DEP’T OF ENV’T, GREAT LAKES AND ENERGY AND MICH. PUB. SERV. COMM’N, *Analysis of Propane Supply Alternatives for Michigan*, at 16–17 (March 2020), <https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Groups/UPETF/Report-2020-03-00-Analysis-Propane-Alternatives-MI.pdf?rev=98ebb04249fb4eef999ad1b81c015174&hash=D7734CEBC1161CA87AE6D5ABB6F4FAF>.

⁸ INTEK, INC., OFF. OF ENERGY POL’Y & SYS. ANALYSIS, *United States Fuel Resiliency: Volume III: U.S. Fuels Supply Infrastructure Vulnerabilities and Resiliency*, at 27 (2014), <https://www.energy.gov/sites/prod/files/2015/04/f22/QR%20Analysis%20-%20United%20States%20Fuel%20Resiliency%20Volume%20III.pdf>.

⁹ *Pipe Dreams: How America Gets Energy*, KITEANDKEYMEDIA.COM, April 2022, <https://www.kiteandkeymedia.com/videos/how-oil-petroleum-natural-gas-pipelines-support-american-energy-demands-keystone-xl-infrastructure/>; see also Letter from EQT to Secretary

Lack of capacity and access to diverse supplies can also result in dire consequences when people rely on natural gas to heat their homes in extreme weather conditions. For example, during Winter Storm Uri in 2021, the supply of natural gas from Texas was severely disrupted, particularly for the generation of electricity, which ultimately resulted in the tragic loss of life.¹⁰

As the energy market has become increasingly global, the Midwest and the U.S. economy more generally have grown more vulnerable to foreign actions that interrupt the market. Even temporary disruptions to the energy supply can cause tumult. Just two years ago, for example, the Colonial Pipeline was shut down for six days after a cyber-attack. The shutdown shocked the Eastern Seaboard's economy. Many gas stations ran out of fuel, including 88% in Washington, D.C., 65% in North Carolina, and nearly 50% in Virginia, South Carolina, and Georgia. In total, the shutdown affected more than 16,000 gas stations.¹¹

Today, “energy markets are in one of their deepest crises of price and supply in decades.”¹² “Gasoline prices have been spiking across the U.S. and Canada, a combination of production and supply-chain pressures created by the COVID-19 pandemic and exacerbated by bans on imports of Russian energy, part of the global

Granholtm 1–2 (Feb. 16, 2022), <https://www.egt.com/wp-content/uploads/2022/02/Letter-to-Secretary-Granholtm-vF2-2.16.22-1.pdf>.

¹⁰ FERC, NERC, and Regional Entity Joint Staff Inquiry, The February 2021 Cold Weather Outages in Texas and the South Central United States (November 2021), <https://bit.ly/3NVabEa>.

¹¹ Stephanie Kelly and Laura Sanicola, *U.S. Capital Running Out of Gas, Even as Colonial Pipeline Recovers*, REUTERS, May 14, 2021, <https://www.reuters.com/business/energy/colonial-pipeline-ramps-up-us-seeks-emerge-fuel-crunch-2021-05-14/>.

¹² Ajit Niranjana, *Russia-Ukraine War Risks Greater Carbon Pollution Despite Boost to Clean Energy*, DW.COM, March 15, 2022, <https://p.dw.com/p/48Ur9>.

effort to sanction Russia over its ongoing invasion of Ukraine.”¹³ The U.S. government’s recent embargo on Russian energy, for instance, caused the price of gasoline to hit “a nationwide average of \$4.17 per gallon, an all-time high since 2008.”¹⁴ The rise in gas prices means an increase in the costs of many other goods, as transportation costs are so closely tied to the price of consumer goods, at a time when inflation is already a major economic concern.

But when domestic production can quickly respond to disruptions in global energy markets, our economy and energy security are improved. As President Biden declared in banning imports of Russian oil and gas, the policy of the Executive Branch is to “reduce our dependence on foreign oil and fossil fuels.”¹⁵ Even more so, “if the U.S. can export natural gas, oil, and coal to its allies, then Russia [and other countries like it] will no longer be in position to ‘blackmail’ western democracies.”¹⁶

Energy independence would not only lower prices and keep the lights on but help protect national security. Meeting energy demands requires the operation and maintenance of current domestic pipelines, such as Line 5. Domestic “supply must

¹³ The Canadian Press, *Michigan Wants “to Have Its Cake and Eat It Too” on Line 5: Chambers of Commerce*, CTV NEWS, March 17, 2022, <https://www.ctvnews.ca/business/michigan-wants-to-have-its-cake-and-eat-it-too-on-line-5-chambers-of-commerce-1.5822865>.

¹⁴ Jason Siegelin & Joe Bingham, *Russia’s Aggression Against Ukraine is Being Fed by America’s Lack of Energy Independence*, REALCLEARENERGY.ORG, April 13, 2022, https://www.realclearenergy.org/articles/2022/04/13/russias_aggression_against_ukraine_is_being_fed_by_americas_lack_of_energy_independence_827010.html.

¹⁵ The White House, *FACT SHEET: United States Bans Imports of Russian Oil, Liquefied Natural Gas, and Coal* (Mar. 8, 2022), <https://bit.ly/39e0Gj1>.

¹⁶ Kevin Mooney, *How Big Green Undermines Pennsylvania’s Energy Potential*, REALCLEARENERGY.ORG, April 14, 2022, https://www.realclearenergy.org/articles/2022/04/14/how_big_green_undermines_pennsylvanias_energy_potential_827185.html.

keep up with demand.” *Id.* But domestic supply cannot keep up with demand if pipelines like Line 5 are prevented from operating.

II. Line 5 is a crucial part of the interstate and international economy.

Line 5 is a critical piece of America’s pipeline infrastructure. To start, it provides much-needed energy to Wisconsin. “Wisconsin’s business community depends on access to affordable and reliable energy, and maintaining energy infrastructure like Line 5 is a key component of that.”¹⁷ A separation facility in Superior, Wisconsin, for example, “is responsible for about 7 percent of the total propane supply for Wisconsin and Minnesota, and a much higher percentage of propane supply for just northern Wisconsin and Minnesota.” (Dkt. 204:4.)¹⁸

Line 5 delivers a crucial source of energy for Wisconsin farmers and papermakers, among others. “Removing Line 5 from operation would send waves through our regional propane and fuel supply, [undoubtedly] leading to shortages and price increases farmers simply can’t afford,” said Keith Ripp, Executive Director of Governmental Relations for the Wisconsin Farm Bureau Federation.¹⁹ And, as explained by the Wisconsin Paper Council’s President, Scott Suder, “Wisconsin’s papermakers and forest products companies couldn’t survive without access to

¹⁷ Press Release, *WMC Testifies in Support of Enbridge Line 5 Relocation Project, Urges Members to Submit Comments in Support of Project*, WMC.ORG, Feb. 5, 2022, <https://www.wmc.org/issues/energy-utilities/wmc-testifies-in-support-of-enbridge-line-5-relocation-project-urges-members-to-submit-comments-in-support-of-project/>.

¹⁸ In this brief, citations to “Dkt.” refer to the docket in W.D. Wis. case no. 19-cv-602.

¹⁹ *Wisconsin Jobs and Energy Coalition: Line 5 Pipeline supporters submit thousands of comments to Wisconsin DNR*, WISPOLITICS.COM, 2022, https://www.wispolitics.com/2022/wisconsin-jobs-and-energy-coalition-line-5-pipeline-supporters-submit-thousands-of-comments-to-wisconsin-dnr/?fbclid=IwAR0OfE79d-3cWYVxT2nlGoXUPzAsaJ2RDGjnFbiMEUWSBO_co0rlujH0ZuY.

reliable and affordable energy[.] . . . Pipelines like Line 5 not only safely and reliably move energy to where it's needed, they free up capacity for trucks and trains to move other goods like paper products.”²⁰

This pipeline is also crucial beyond Wisconsin. “Line 5 as interstate and international infrastructure is critical to North America’s energy security.”²¹ This pipeline “has been in use since 1953, and transports up to 540,000^[22] barrels of light crude oil and natural gas liquids per day.”²³ “These petroleum products are refined into propane, gasoline, jet fuel, and other products at refineries and factories in Ontario and Quebec, as well as in Indiana, Michigan, Ohio and Pennsylvania.”²⁴ “Line 5 delivers more than half the propane and home heating oil consumed in Michigan, and is a vital source of energy for Ohio and Pennsylvania as well”²⁵ This pipeline also “supplies central Canada with gasoline, jet fuel and heating fuel.”²⁶

²⁰ *Id.*

²¹ *Economic Relationship Between Canada and the United States*, Special Committee on the Economic Relationship Between Canada and the United States, 43rd Parliament (2021) (statement of Aaron Henry, Senior Director, Natural Resources and Sustainability, Canadian Chamber of Commerce), <https://www.ourcommons.ca/DocumentViewer/en/43-2/CAAM/meeting-4/evidence#Int-11189683>.

²² One barrel equals 42 gallons. *How many gallons of gasoline and diesel fuel are made from one barrel of oil?*, U.S. Energy Information Administration (May 1, 2023), <https://www.eia.gov/tools/faqs/faq.php?id=327&t=9>.

²³ HOUSE OF COMMONS, *Enbridge’s Line 5: An Interim Report*, 43rd Parliament, 2nd Session (2021), at 3, <https://www.ourcommons.ca/Content/Committee/432/CAAM/Reports/RP11234513/caamrp01/caamrp01-e.pdf>.

²⁴ *Id.*

²⁵ M.D. Kittle, *The Pipeline War*, WISCONSINSPOTLIGHT.COM, March 20, 2022.

²⁶ *Economic Relationship Between Canada and the United States*, Special Committee on the Economic Relationship Between Canada and the United States, 43rd Parliament (2021) (statement of Aaron Henry, Senior Director, Natural Resources and Sustainability, Canadian Chamber of Commerce), <https://www.ourcommons.ca/DocumentViewer/en/43-2/CAAM/meeting-4/evidence#Int-11189683>.

Line 5 thus has strong support from “[a] diverse coalition consisting of union workers, farmers, small business owners and forest products companies.”²⁷

Line 5 has “no alternative.”²⁸ Without this pipeline, for example, “approximately 3,100 loaded and empty tanker trucks would be added to Wisconsin’s roads every day.” (Dkt. 206:3.) But infrastructure does not currently exist to replace Line 5: “the [natural gas liquids] and crude oil shortfalls resulting from a Line 5 closure could not be satisfied by any alternate means of transportation, including rail, barge, or truck.” (Dkt. 206:2.) And “even if one were to assume that there was a feasible way to transport Line 5 products by rail, the cost to transport Line 5 products by rail rather than pipeline would be much higher.” (Dkt. 206:8.) The costs to transport by rail would be 2.6 times higher for crude oil and 3.4 times higher for natural gas liquids than Line 5 transportation costs. (Dkt. 206:8.)

²⁷ *Wisconsin Jobs and Energy Coalition: Line 5 Pipeline supporters submit thousands of comments to Wisconsin DNR*, WISPOLITICS.COM, 2022, https://www.wispolitics.com/2022/wisconsin-jobs-and-energy-coalition-line-5-pipeline-supporters-submit-thousands-of-comments-to-wisconsin-dnr/?fbclid=IwAR0Ofe79d-3cWyVxT2nlGoXUPzAsaJ2RDGjnFbiMEUWSBO_co0rlujH0ZuY.

²⁸ *Economic Relationship Between Canada and the United States*, Special Committee on the Economic Relationship Between Canada and the United States, 43rd Parliament (2021) (statement of Aaron Henry, Senior Director, Natural Resources and Sustainability, Canadian Chamber of Commerce), <https://www.ourcommons.ca/DocumentViewer/en/43-2/CAAM/meeting-4/evidence#Int-11189683>.

III. Plaintiff's requested relief—the shutdown of Line 5—would greatly harm the United States and Canada.

If the Plaintiff has its way, this Court will “pause” (if not permanently halt) pipeline operations. But even a temporary shutdown of Line 5 would greatly harm the United States and Canada. Importantly, shutting down supply would do nothing to reduce demand for oil. Shutting down Line 5 before a re-route is possible “would have substantial adverse impacts on the economy, workers in a variety of sectors, and households throughout Michigan, Wisconsin, and Ontario.” (Dkt. 205:2.) Those adverse impacts include shortages of critical heating fuels and refined products, resulting in increased prices and widespread shortages in Wisconsin, Minnesota, and Michigan. (Dkt. 205:2.)

If Line 5 were shut down, ten refiners in Ohio, Michigan, Pennsylvania, Ontario, and Quebec would lose about 38% of their total crude oil supply. (Dkt. 204:5.) Such a closure would cause refiners to “suffer impacts ranging from significant to severe until a re-route of Line 5 around the Bad River Reservation is completed.” (Dkt. 204:6.) “[I]t is quite possible that one or more [refiners] will close if Line 5 is shut down for any period of time.” (Dkt. 204:8.)

Moreover, closure of Line 5 “would have catastrophic economic impacts to Canada.”²⁹ “For example, 25% of propane that is marketed in Ontario is used in

²⁹ *Economic Relationship Between Canada and the United States*, Special Committee on the Economic Relationship Between Canada and the United States, 43rd Parliament (2021) (statement of Dan Kelly, Past Chair, Canadian Propane Association), <https://www.ourcommons.ca/DocumentViewer/en/43-2/CAAM/meeting-5/evidence#Int-11192086>.

hospitals, schools and businesses. In Quebec, that number rises to 45%.”³⁰ “However, without Line 5, providing Canadians with this critical source of energy would be significantly more difficult.”³¹

In addition to providing critical energy supply, Line 5 supports countless jobs and other economic activity. Shutting down Line 5 would devastate many sectors of the economy and destroy thousands of jobs. (Dkt. 205:3–4.) Agriculture, pharmaceuticals, electronics, medical supplies, and other industries would feel the effects.³² “[A] Line 5 closure would result in job losses and lost economic output throughout the Great Lakes region, as well as in Canada, particularly Ontario.” (Dkt. 205:2.) “Low-income households will be particularly impacted by shortages and price increases.” (Dkt. 205:2.) “However, the consequences won’t be restricted to the states and provinces that are directly affected. The negative impact would be nationwide in both countries.”³³ A closure of Line 5 would likely cause an economic loss for the United States and Canada totaling billions of dollars per year. (Dkt. 205:4.)

In light of the foregoing, shutting down any segment of the Line 5 pipeline would have disruptive consequences to the United States’ economy and energy security.

³⁰ *Id.*

³¹ *Id.*

³² *Economic Relationship Between Canada and the United States*, Special Committee on the Economic Relationship Between Canada and the United States, 43rd Parliament (2021) (statement of Joseph Mancinelli, International Vice-President, Central and Eastern Canada Regional Manager, Laborers’ International Union of North America), <https://www.ourcommons.ca/DocumentViewer/en/43-2/CAAM/meeting-5/evidence#Int-11191807>

³³ *Id.*

CONCLUSION

This Court should decline to enter any shutdown of Line 5.

Respectfully submitted this 18th day of September 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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Dated: September 18, 2023

/s/ Scott E. Rosenow

Scott E. Rosenow

CERTIFICATE OF SERVICE

I certify that on September 18, 2023, I caused a true and correct copy of the foregoing brief to be served via the Court's ECF system upon all counsel of record. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 18, 2023

/s/ Scott E. Rosenow

Scott E. Rosenow