2003-02
13.

STATE OF MICHIGAN
IN THE SUPREME COURT

MAYOR OF THE CITY OF LANSING;
CITY OF LANSING, MICHIGAN and
INGHAM COUNTY COMMISSIONER
LISA DEDDEN,

Appellees/Cross-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION
and WOLVERINE PIPELINE COMPANY,

Appellants/Cross-Appellees.

Michigan Supreme Court No. 124136
Court of Appeals No. 243182
Commission Case No. U-13225

MICHIGAN MUNICIPAL LEAGUE'S AMICUS CURIAE BRIEF

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction under MCR 7.301(A)(2) because this is an appeal from a decision of the Court of Appeals.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER MICHIGAN CONST ART 7, § 29 REQUIRES A PETROLEUM PIPELINE COMPANY TO OBTAIN THE CONSENT OF A CITY BEFORE BUILDING A PIPELINE IN AN INTERSTATE HIGHWAY RIGHT-OF-WAY RUNNING THROUGH THE CITY?

Appellant/Cross-Appellee Wolverine Pipeline Company says "NO."

Appellee/Cross-Appellant Mayor of City of Lansing, City of Lansing and Ingham County Commissioner Lisa Dedden say "YES."

Amicus Curiae Michigan Municipal League says "YES."

II. WHETHER MCL 247.183 REQUIRES A PETROLEUM PIPELINE COMPANY TO OBTAIN THE CONSENT OF A CITY BEFORE BUILDING A PIPELINE IN AN INTERSTATE HIGHWAY RIGHT-OF-WAY RUNNING THROUGH THE CITY?

Appellant/Cross-Appellee Wolverine Pipeline Company says "NO."

Appellee/Cross-Appellant Mayor of City of Lansing, City of Lansing and Ingham County Commissioner Lisa Dedden say "YES."

Amicus Curiae Michigan Municipal League says "YES."

MICHIGAN MUNICIPAL LEAGUE'S AMICUS CURIAE BRIEF

INTRODUCTION

Wolverine Pipeline Company ("Wolverine") proposes to construct a liquid petroleum pipeline in the right-of-way of I-96 in Ingham County Michigan. A part of the proposed pipeline would run through the City of Lansing ("City"). The legal question before the Court is whether Wolverine is required to obtain the City's consent before building the pipeline.

FACTS AND PROCEDURAL HISTORY

Wolverine builds and operates pipelines used to transport petroleum products. Wolverine operates approximately 750 miles of pipeline facilities in Michigan and supplies 35% of all refined products in Michigan. Ex. 1, p 1. The petroleum transported by Wolverine is used for fuel in cars, planes, and trucks and for fuel to heat homes and businesses. Ex. 2, p 2.

Wolverine proposes to build a liquid-petroleum pipeline in the I-96 right-of-way running through Ingham County and the City. I-96 is a state trunk line highway and a limited access interstate highway. The State of Michigan owns the right-of-way where the pipeline would be located.

The pipeline is intended to meet consumer demand for petroleum products in the east-central, central, and northern Michigan areas. See Wolverine's brief, p 7; Wolverine's App, pp 1a-38a. Wolverine claims "[t]he continued, adequate, and safe supply of gasoline and other liquid petroleum products to mid-Michigan depends on the pipeline's construction." Wolverine's brief, p 3.

Wolverine applied to the Michigan Public Service Commission ("Commission") for approval of the proposed pipeline. The City intervened in Commission proceedings on the Wolverine application. The City argued that a Commission rule, in conjunction with MCL 247.183 and Const 1963, art 7, § 29, required Wolverine to obtain the City's consent for the pipeline before it applied for the Commission's approval. The Commission concluded Wolverine could apply for the Commission's approval before securing the City's consent.

The City appealed the Commission's decision to the Court of Appeals. The Court of Appeals ruled Wolverine can apply to the Commission before getting the City's consent; but MCL 247.183 requires Wolverine to get the City's consent before building the pipeline through the City.

Both Wolverine and the City appealed to the Supreme Court. The Supreme Court has directed the parties to brief, among other issues, whether Wolverine is a "public utility" as that term is used in MCL 247.183, and the manner and extent to which paragraph (1) and (2) of MCL 247.183 apply to this case. The Michigan Municipal League files this brief supporting the City's position that Wolverine must obtain the City's consent before building a pipeline through the City.

STATE LAWS APPLYING TO WOVLERINE'S PROPOSED PIPELINE

Two areas of state law apply to the construction of a petroleum pipeline in the right-of-way of a public highway: (1) laws regulating petroleum pipelines, and (2) laws governing a utility company's use of highways.

State Laws Authorizing The Regulation Of Petroleum Pipelines

The Michigan Public Service Commission Act, MCL 460.1 *et seq.* ("Commission Act") vests the Commission with power and jurisdiction to regulate all public utilities. Pursuant to 1929 P.A. 16, MCL 483.1 *et seq.* ("Act 16"), the Commission is vested with specific authority to regulate companies transporting petroleum through pipelines in the State of Michigan. See MCL 483.3. Under rules promulgated by the Commission, a company proposing to build a petroleum pipeline must apply to the Commission and show a public need for the pipeline. The Commission also requires a showing that the proposed pipeline is designed and routed in a reasonable manner and meets safety and engineering standards. In accord, Wolverine sought the Commission's approval for the proposed pipeline. The Commission approved Wolverine's request to build a pipeline in the I-96 right-of-way running through the City.

State Laws Governing A Public Utility's Use of Highways

Michigan's Highway Code, MCL 247.171 *et seq*, authorizes public utility companies to locate utility facilities under public roads and other public places. See MCL 247.183. Act 16 also permits a company to use Michigan highways to transport petroleum through pipelines. See MCL 483.1, 483.2.[1]

[1] MCL 483.1 provides:

"Every corporation, association or person now or hereafter exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, by or through pipeline or lines, for hire, compensation or otherwise, or now or hereafter 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 now or hereafter engaging in the business of buying, selling or dealing in crude oil or petroleum, within the limits of this state, shall not have or possess the right to conduct or engage in said

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Local Consent Powers

Michigan law concerning a public utility's use of public places vests broad power in local governments. The Michigan Constitution gives local governments the power to consent to a public utility's use of highways, streets, alleys, or other public places. 1963 Const, art 7, § 29. The Michigan Highway Code also gives a local government a power of consent concerning a public utility company's construction of utility facilities under public roads running through the boundaries of the local government. MCL 247.183(1). The question in this case is whether these laws give the City the power of consent

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business or operations, in whole or in part, as above described, or have or possess the right to locate, maintain, or operate the necessary pipelines, fixtures, and equipment thereunto belonging, or used in connection therewith, concerning the said business of carrying, transporting or storing crude oil or petroleum as aforesaid, 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 or rights, concerning said business or operations, in whole or in part except as authorized by and subject to the provisions of this act, except, further, and only such right or rights as may already exist which are valid, vested, and incapable of revocation by any law of this state or of the United States".

MCL 483.1

MCL 483.2 provides:

"For the purpose of acquiring necessary right-of-ways, every such corporation, association or person is hereby granted the right of condemnation by eminent domain, and the use of the highways in this state, for the purpose of transporting petroleum by pipelines, and the location, laying, constructing, maintaining and operations thereof; and such condemnation proceedings shall be conducted in accordance with the same procedure and in the same manner as is provided by the laws of this state for the condemnation of right-of-ways by railroad companies."

MCL 483.2.

concerning Wolverine's proposal to run its pipeline under that part of I-96 running through the City.

STANDARD OF REVIEW

This case requires an interpretation of Const 1963, art 7, § 29 and MCL 247.183. Constitutional and statutory interpretation questions are reviewed *de novo*. *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250; 632 NW2d 126 (2001).

ARGUMENT

I. CONST 1963, ART 7, § 29 GIVES THE CITY THE POWER OF CONSENT REGARDING WOLVERINE'S PROPOSAL TO RUN A PIPELINE IN THE I-96 RIGHT-OF-WAY THROUGH THE CITY.

Article 7, § 29 grants municipalities certain powers relating to highways and streets. Article 7, § 29 provides:

> Sec. 29. *No person*, partnership, association or corporation, public or private, *operating a public utility shall have the right to the use of the highways*, streets, alleys or other public places of any county, township, city or village *for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village*; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government. (emphasis added)

Const 1963, art 7, § 29.

Article 7, § 29 raises three issues: (1) does Wolverine operate a public utility, (2) does Article 7, § 29 apply to highways running through a city's boundaries, and (3) does

a municipality's Article 7, § 29 power of consent trump powers of the state transportation department?

A. Wolverine Is A Public Utility Under Const art 7, § 29.

The threshold question is whether Wolverine is a public utility under Article 7, § 29. Courts should give effect to the plain meaning of words used in the Constitution. *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-640; 272 NW2d 495 (1978). Unlike the language of Const art 7, § 25, the language of Article 7, § 29 does not limit the scope of "public utility" to specific utilities.[2] Applying a plain meaning of "public utility" without any specific limitations, Wolverine is a public utility under Const 1963, art 7, § 29 just as it is under MCL 247.183. See argument II.A., *infra*.

B. Const 1963, art 7, § 29 Applies To Highways Running Through A City.

Article 7, § 29 has been consistently interpreted to apply not only to highways and streets owned by a local unit of government, but also to any highways and streets running through their municipal boundaries. See *Union Township v Mt Pleasant*, 381 Mich 82;

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[2] Article 7, § 25 provides:

> "No city or village shall acquire *any public utility furnishing light, heat or power*, or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless the proposition shall first have been approved by three-fifths of the electors voting thereon. No city or village may sell any public utility unless the proposition shall first have been approved by a majority of the electors voting thereon, or a greater number if the charter shall so provide." (emphasis added)

Const 1963, art 7, § 25. The has Court found the language "public utility furnishing light, heating or power" as limiting the scope of "public utility" under Article 7, § 25 to utilities furnishing light, heating or power. *White v Ann Arbor*, 406 Mich 554; 281 NW2d 283 (1979).

158 NW2d 905 (1968); *Allen v Ziegler*, 338 Mich 407; 61 NW2d 625 (1953); *Jones v Ypsilanti*, 26 Mich App 574; 182 NW2d 795 (1970) (municipalities were meant to retain reasonable control over state trunk line highways located within their boundaries); see also *OAG* 1977 – 1978, p 448 (Const 1963, art. 7, § 29 applies to state trunk line highways).

In *Union Township*, for example, Union Township sued to enjoin the City of Mt. Pleasant from constructing a water pipeline within a county road running through the township. The Court ruled both Const 1963, art 7, § 29 and MCL 247.183 require the township's consent before the city could construct the pipeline. *Id.*, p 89. MCL 247.183 was significant to the Court's decision. The Court construed MCL 247.183 to mean townships retained their right of reasonable control of utility use of any public road, including a state highway, passing through their territory. *Id.*, pp 89-90. The Court noted its interpretation of the statute is entirely consistent with Article 7, § 29. In other words, Article 7, § 29 applies not only to city owned streets, but also highways passing through a city's limits.

The Court should affirm its holdings in *Union Township* and *Allen* and reject Wolverine's attempt to limit the scope of Article 7, § 29 to roads owned by municipalities. Wolverine fails to cite any case law supporting its narrow reading of Article 7, § 29. See Wolverine's Court of Appeals Brief, p 16. Besides, any ambiguity in the scope of Article 7, § 29 must be interpreted liberally in favor of municipalities. See Const art 7, § 34, *infra*. If the Court reverses its existing precedent, it will dramatically strip the power of local governments to protect their residents in areas of local concern.

C. **A City's Specific Power Of Consent Under Const 1963, art 7, § 29 Overrides Any General Powers Of The State Department Of Transportation.**

Const 1963, art 7, § 29 grants two powers to local governments, one general and one specific. The general power granted is the right to reasonable control over highways and streets. The specific power enumerated is one of consent over a public utility company's use of highways and streets. The Constitution also grants the state transportation commission general powers over highways. Article 5, § 28 provides in relevant part:

> Sec. 28. There is hereby established a state transportation commission, which shall establish policy for the state transportation department transportation programs and facilities, and such other public works of the state, as provided by law...

Const 1963, art 5, § 28.

Courts have addressed the relationship between a municipality's general regulatory powers under Article 7, § 29 and the state transportation commission's general powers over highways under Const art 5, § 28. The relationship between a municipality's specific power of consent under Article 7, § 29 and the state transportation commission's general powers under Const art 5, § 28, however, is a question of first impression in Michigan.

1. A municipality's general power to regulate state highways is subject to the general power of the state transportation commission.

Michigan courts have considered a municipality's general powers under Article 7, § 29 in relation to the state transportation commission's general powers under Article 5, § 28. See *Allen, supra*; *Jones, supra*; see also *OAG* 1977 – 1978, p 448. In these cases, the

general power of a municipality to regulate roads was at issue, not its specific power of consent concerning utility use of highways. *Allen* involved the regulation of parking on state trunk lines; *Jones* involved the regulation of sidewalks; and *OAG* 1977-1978 involved the regulation of trucks and weight limits on state trunk lines. In these circumstances, the Courts and the Attorney General reconciled the competing state and local interests. They concluded that municipalities retain reasonable control over state highways passing through their boundaries so long as that control does not conflict with the paramount jurisdiction of the state highway commission under Article 5, § 28. *Jones, supra.*

The Court's jurisprudence concerning the general regulation of highways makes sense because the primary role of the state transportation department is the construction, operation and maintenance of highways. This case, however, is not about the construction of a highway. Instead, it is about the construction of a potentially dangerous pipeline through a city without the city's consent. Public utilities are generally placed under the control of local authorities rather than the state transportation department. See e.g. Const art 7, §§ 24, 25, 29. In accord, Article 7, § 29 gives a municipality primary say in a public utility's use of a highway passing through a municipality's boundaries.

2. A municipality's specific constitutional power of consent over a utility's use of a highway prevails over the general power of the state transportation commission.

Although a municipality's general power to control highways may yield to the state transportation commission's general power over highways, a municipality's specific power of consent over a public utility company's use of the highways does not. A city's

power of consent under Article 7, § 29 overrides the authority of the state transportation department for reasons (a), (b), and (c) below.

a. Specific constitutional provisions control over general provisions.

Where there is a conflict between general and specific provisions in a constitution, specific provisions control. *Advisory Opinion on Constitutionality of 1978 PA 426*, *supra*, pp 639-640. This rule of construction is grounded on the premise that a specific provision must prevail with respect to its subject matter, since it is regarded as a limitation on the general provision's grant of authority. *Id.* The general provision only applies in cases where the specific provision does not apply. *Id.* Article 5, § 28 is a general provision requiring the state transportation commission to establish policy for the state transportation programs. The provision is not specific regarding a utility company's use of the highways and streets in the state. Article 7, § 29, on the other hand, is a specific provision expressly granting municipalities a power of consent concerning a public utility company's use of highways and streets. In this case, the specific language of Article 7, § 29 controls and prevails over the general language of Article 5, § 28.[3]

[3] At the time the Court decided *Allen*, Article 5, §28 granted the state highway commission "jurisdiction and control over state trunkline highways" and other public works. A 1978 amendment rewrote the section and eliminated the express "jurisdiction and control" language. See Const art 5, § 28 Historical Notes. In its current form, Article 5, § 28 is even more general concerning the state highway commissions powers. Thus, the notion that the specific powers of cities relating to utility use of highways trumps the general power of the state highway commission is even stronger.

b. Applying the rule of common understanding, the plain language of Article 7, § 29 governs over Article 5, § 28.

The primary rule of construction of the constitution is the rule of "common understanding."[4] In ascertaining the meaning of words in a constitution, a court should give effect to the plain meaning of such words as understood by the people who adopted it. *Advisory Opinion on Constitutionality of 1978 PA 426, supra.* Article 7, § 29 plainly provides that a public utility shall not have the right to use highways and streets for utility facilities without the consent of the local government. There is no mention in the constitution that a similar power of consent is vested in the state transportation department. Any lay person reading the constitution would be mystified to learn of such an unexpressed superior power. In ratifying the 1963 Constitution, the Michigan electorate assuredly ascribed this power of consent to cities under Article 7, § 29, not to the state under Article 5, § 28.

c. The Constitution requires the Court to construe municipal powers liberally in favor of local governments.

The specific power given local governments under Article 7, § 29 governs over the executive branch's general powers concerning highways for another reason as well. The constitution directs the Court to construe provisions in the constitution concerning local government liberally in their favor. Const art 7, § 34.[5] If the plain language is not

[4] Justice Cooley explained this principle:

"A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it. *Traverse City Sch Dist v AG*, 384 Mich 390, 405; 185 NW2d 9 (1971) citing Cooley, Constitutional Limitations (6th ed), p 81.

[5] Const art 7, § 34 provides:

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enough, this constitutionally mandated principle weighs in the City's favor. Thus, Article 7, § 29's specific grant of power given to municipalities regarding utility lines overrides the general power of the state transportation commission under Article 5, § 28.

Even though the supreme law of the state specifically gives the City the power of consent over Wolverine's proposed pipeline, the Court, like the Court of Appeals, can avoid a constitutional question in this case. The Court should construe statutes to avoid constitutional questions whenever possible. See *Silver Creek Drain Dist v Extrusions Divi, Inc,* 468 Mich 367; 663 NW2d 436 (2003). By simply applying a state statute concerning public utility use of highways, the Court should reach the same conclusion required by the constitution.

II. MCL 247.183 GIVES THE CITY THE POWER OF CONSENT OVER WOLVERINE'S PROPOSAL TO RUN A PIPELINE IN THE I-96 RIGHT-OF-WAY THROUGH THE CITY.

The Legislature has enacted a statute consistent with a City's power of consent under Const art 7, § 29. MCL 247.183 governs a City's power of consent over a public utility company's use of public places and highways and provides in relevant part:

> Sec. 13. (1) Telegraph, telephone, power, and other *public utility companies*, cable television companies, and municipalities *may enter upon, construct, and maintain* telegraph, telephone, or power lines, *pipelines*, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or *under any public road*, bridge, street, or public place, *including, subject to subsection (2), longitudinally within limited access highway rights-of-way*, and across or

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"The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other *public utility company*, cable television company, and municipality, *before any of this work is commenced, shall first obtain the consent of the governing body of the city*, village, or township *through or along which these lines and poles are to be constructed and maintained.*

(2) A utility as defined in 23 CFR 645.105(m) may enter upon, construct, and maintain utility lines and structures longitudinally within limited access highway rights-of-way in accordance with standards approved by the state transportation Commission that conform to governing federal laws and regulations. The standards shall require that the lines and structures be underground and be placed in a manner that will not increase highway maintenance costs for the state transportation department. The standards may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights-of-way. The imposition of a reasonable charge is a governmental function, offsetting a portion of the capital and maintenance expense of the limited access highway, and is not a proprietary function. The charge shall be calculated to reflect a 1-time installation permit fee that shall not exceed $1,000.00 per mile of longitudinal use of limited access highway rights-of-way with a minimum fee of $5,000.00 per permit. All revenue received under this subsection shall be used for capital and maintenance expenses incurred for limited access highways. (emphasis added).

MCL 247.183 (1), (2).

The Court must apply MCL 247.183 to determine whether the local consent power contained in subsection (1) applies to Wolverine's proposed I-96 work through the City. This task involves two fundamental questions: (1) is Wolverine a "public utility" within the meaning of MCL 247.183(1); and (2) does the local consent power of MCL 247.183 apply to Wolverine's proposed I-96 work?

A. **Wolverine Is a "Public Utility" Company Within The Meaning Of MCL 247.183(1).**

The Michigan Highway Act, MCL 247.171 *et seq.*, does not expressly define "public utility." When a term used in a statute is undefined and is not understood to have a technical or peculiar meaning in the law, it should be given its plain and ordinary meaning. *Federated Publ'ns, Inc v City of Lansing*, 467 Mich 98, 107; 649 NW2d 383 (2002) See also MCL 8.3a. Courts may consult dictionary definitions when interpreting undefined statutory terms. *Koontz v Ameritech Servs*, 466 Mich 304, 316-317; 645 NW2d 34 (2002).

1. A "public utility" company serves the public interest rather than private interests and is regulated by the government.

Merriam Webster's Collegiate Dictionary (1994) defines "public utility":

> Public utility: a business organization (as an electric company) performing a public service and subject to special governmental regulation.

Under this definition, the focus is on the nature of the service provided and whether the service is regulated by the government. A "public utility" is characterized by public service as opposed to private service. "Public" relates to people in general versus private affairs. *Merriam Webster's Collegiate Dictionary* (1994).[6] Therefore, the dictionary

[6] *Merriam Webster's Collegiate Dictionary* (1994) defines "Public" to mean:

1a: exposed to general view; open; b: well-known, prominent; c: perceptible, material; 2a: of, relating to, or affecting all the people or the whole area of a nation or state; b: of or relating to a government; c: of, relating to, or being in the service of the community or nation; 3a: of or relating to people in general: universal; b: general popular; 4: of or relating to business or community interests as opposed to private affairs: social; 5: devoted to the general or national welfare: humanitarian; 6a: accessible to or shared by all members of the community; b: capitalized in shares that can be freely traded on the open market-often used with go.

definition of "public utility" contemplates a company providing services related to the public generally rather than private interests.

Michigan common law has drawn the same distinction between public and private services as suggested by the dictionary definition of "public utility". In *Schurtz v Grand Rapids*, 208 Mich 510; 175 NW 421 (1919), the Court found a waterworks plant that supplied water to the residents of Grand Rapids to be a "public utility" under the predecessor provision to Const art 7, § 25,[7] a state statute, and a city charter provision. The Court established a common law definition of public utility:

> "We think the term 'public utility' means every corporation, company...that may own, control, or manage, *except for private use* any equipment, plant, or generating machinery in the operation of a public business or utility. Utility means the state or quality of being useful." (emphasis added)

Schurtz, supra, p 524. The Court of Appeals applied this common law definition in *Bruce Township v Gout,* 207 Mich App 554; 526 NW2d 40 (1994) to conclude that a natural gas company that produced and sold gas to another utility company for distribution to the public was a public utility company under MCL 247.183(1). The Court of Appeals specifically noted the company did not use any of the gas for its own purposes or sell it to anyone else. *Bruce Twp, supra*, p 559. Thus, the public service characteristic of a "public utility" is well established.

The context in which the term "public utility" is used in MCL 247.183(1) supports the dictionary and common law definitions. In giving meaning to a word, courts should

[7] See note 2, *supra.*

consider the context or setting in which the words are used. *Koontz*, *supra*, p 318.[8] In subsection (1), the general term "other public utility companies" is preceded by "telegraph, telephone, [and] power" companies. Telegraph, telephone, and power companies typically provide services affecting the public generally and are not limited to serving finite private interests. Applying the canon of construction known as *ejusdem generis*, the general term "other public utility companies" should be taken as sharing this common characteristic. *See e.g.*, *Weakland v Toledo Eng'g Co, Inc.*, 467 Mich 344, 349-350; 656 NW2d 175 (2003).[9] The Commission also regulates these types of companies. *See* MCL 460.6.[10] Understanding "public utility" under MCL 274.183 as a utility

[8] "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis: '[i]t is known from its associates,'* see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting." *Koontz*, *supra*, p 318, quoting *Brown v Genesse County Bd of Comm'rs (After Remand)*, 464 Mich 430, 437; 628 NW2d 471 (2001), quoting *Tyler v Livonia Pub Schs*, 459 Mich 382, 390-391; 590 NW2d 560 (1999).

[9] The Court has utilized this canon in defining the scope of a broad term following a series of specific items. The canon stands for the proposition that when a text lists a series of items, a general term included in the list should be limited to items of the same sort. *Weakland, supra,* p 350 citing A. Scalia, *A Matter of Interpretation* (Princeton, New Jersey: Princeton University Press, 1997), p 26.

[10] MCL 460.6 provides:

"The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; and all public transportation and communication agencies other than railroads and railroad companies."

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providing service affecting the public generally and as a company regulated by the government is consistent with a common definition of the term, Michigan common law, and the context in which the term is used.

2. Wolverine is a "public utility" company because it provides public service and is regulated by the government.

Wolverine meets the definition of "public utility" as used in MCL 247.183. Wolverine's proposed pipeline is designed to provide services related to the public generally. The pipeline is intended to meet consumer demand for petroleum products in the east-central, central, and northern Michigan areas. The liquid petroleum transported in Wolverine's Michigan pipelines is used for fuel in cars, planes, and trucks and for fuel to heat homes and businesses. Wolverine even claims "[t]he continued, adequate, and safe supply of gasoline and other liquid petroleum products to mid-Michigan depends on the pipeline's construction." Wolverine's brief, p 3. Obviously, the proposed pipeline significantly implicates service to the public generally and is not designed to serve limited private interests. Because Wolverine provides utility services for public use, it is a "public utility" within the meaning of MCL 247.183.

If Wolverine's proposed pipeline was not designed to serve a public purpose, it would be prohibited from placing pipelines under public highways, including limited access highway right-of-way. I-96 is a state highway. The I-96 right-of-way where the proposed pipeline will run is owned by the State of Michigan. See Commission Court of Appeals brief, p 12-13. The state presumably exercised its eminent domain powers to

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MCL 460.6
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obtain the right-of-way necessary to build I-96. The power of eminent domain may only be invoked for a public use or purpose. Const 1963, art 10, § 2. See also *Poletown Neighborhood Council v Detroit*, 410 Mich 616, 629; 304 NW2d 455 (1981); *Dome Pipeline Corp v Public Service Com*, 176 Mich App 227, 237; 439 NW2d 700 (1989). Condemnation for a private use or purpose it prohibited. *Id.* Condemnation and use of highway rights by pipeline companies, whether under PA 16 or other state law, must comply with this constitutional principle.

Wolverine also satisfies the definition of "public utility because it is subject to special governmental regulation. Wolverine is generally regulated by the Commission because it is a "public utility" within the meaning of the Commission Act. See MCL 460.6. The Commission Act defines "public utility" to include pipeline companies. *Id.* The MCPS is also granted specific powers to regulate Wolverine under 1929 PA 16, MCL 483.1 to 483.11. Act 16 grants the Commission authority to control and regulate companies transporting petroleum through pipelines, unless the nature of the company's business is private and where there is no public interest involved. MCL 483.3.[11] Neither

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[11] MCL 483.3 provides:

"There is hereby granted to and vested in the Michigan public utilities commission, hereinafter styled the "commission," the power to control, investigate and regulate every corporation, association or person, now or hereafter exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, by or through pipeline or lines, for hire, compensation or otherwise, or now or hereafter 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 now or hereafter engaging in the business of buying, selling or dealing in crude oil or petroleum within the limits of this state: Provided, however, That all corporations, associations, or persons who are producers, or

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Wolverine nor the Commission have claimed Wolverine is exempt from Act 16 under the private business exception. Wolverine is also subject to Michigan statutes protecting underground facilities. See MCL 460.701. MCL 460.701 relates to the protection of underground facilities and defines "public utility" to include pipeline companies subject to the jurisdiction of the Commission under the Commission Act and Act 16. MCL 460.701(d).[12] Wolverine is even assessed costs as a "public utility" under 1972 PA 299, MCL 460.111 *et seq*, to cover the State of Michigan's expenses in regulating public utilities.[13]

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refiners of crude oil, or petroleum, or operators of private trunk or gathering lines or other methods of conveying such products, where the nature and extent of their business is private, and where in the conduct thereof no public interest is involved, are hereby specifically excepted and excluded from the terms of this act."

MCL 483.3.

[12] MCL 460.701(d) defines "public utility":

> Electric, steam, gas, telephone, power, water or pipeline company subject to the jurisdiction of the Public Service Commission pursuant to Act No. 3 of the Public Acts of 1939, as amended, being sections 460.1 to 460.8 of the Michigan Compiled Laws...[and] Act No. 16 of the Public Acts of 1929, being sections 483.1 to 483.11 of the Michigan Compiled Laws....

MCL 460.701(d)

[13] MCL 460.111(c) defines "public utility":

"Public utility" means a steam, heat, electric, power, gas, water, telecommunications, telegraph, communications, pipeline, or gas producing company regulated by the commission, whether private, corporate, or cooperative, except a municipally owned utility."

MCL 460.111(c).

Wolverine says it could be a "public utility company" under MCL 247.183. The Court of Appeals, the City, and the Michigan Municipal League agree. Reading MCL 247.183(1) objectively and applying a common definition of the term "public utility," the Court should agree as well.

B. The Local Consent Power Of MCL 247.183(1) Applies To Wolverine's Proposed Limited Access Highway Work.

When interpreting statutes, courts strive to discern and give effect to the intent of the Legislature. *Federated Publication, supra* at p 107. The Supreme Court discerns that intent by examining the specific language of a statute. *Id.* If the language is clear, the Court presumes that the Legislature intended the meaning it has plainly expressed and the statute will be enforced as written. *Id*; *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. *Koontz, supra*, at p 319.

MCL 247.183(1) unambiguously says a city has the power of consent concerning any of the public utility work described in subsection (1). The first sentence of MCL 247.183(1) describes the work the designated entities are authorized to perform. Following a description of the authorized work in the first sentence, the second sentence says "any of this work" requires the consent of any city, village, or township through which the lines are constructed. In this context, "any" means "all". Therefore, all work described in subsection (1) and running through a city requires the consent of the city.

The statute is clear and cannot be reasonably interpreted in any other way. Therefore, judicial construction is not permitted. See *Koontz*, *supra*, at p 319.

The role of the Court is to simply apply the terms of MCL 247.183(1) to the facts of this case. *See Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220, 666 NW2d 199 (2003). The work described in subsection (1) plainly includes limited access highway work. The first sentence describes the places where a public utility may construct a pipeline as "including, subject to subsection (2), longitudinally within limited access highway rights-of-way." Wolverine proposes to construct its pipeline longitudinally in the I-96 right-of-way running through the City. I-96 is a limited access highway. Since Wolverine's proposed work is included within "any" of the work delineated in subsection (1), Wolverine must obtain the City's consent before building its pipeline.

Wolverine argues the clause "subject to subsection (2)" exempts limited access right-of-way work from the local consent requirement. Wolverine errs. Wolverine reads the words "subject to" as meaning solely under the control of subsection (2). As written, however, the clause "subject to subsection (2)" describes a condition for utilities installed longitudinally in limited access rights-of-way. In using this modifying clause, the legislature made limited access right-of-way work contingent on compliance with subsection (2) standards. The clause says no more. Neither this clause nor any other words in MCL 247.183 exempt limited access right-of-way work from the consent requirement of subsection (1).

Although Wolverine suggests otherwise, there is no ambiguity concerning the local consent requirement for limited access highway right-of-way work. The Court

should not find an ambiguity where none exists. The Court should simply read the current statute objectively and apply it to this case. The Court should do no more.

Wolverine leads the Court down the unnecessary and cloudy path of legislative history. The Court should not follow. There is no ambiguity to justify looking outside the plain words of the statute. Nonetheless, the history of the language used in MCL 247.183 shows the legislature changed the statute in 1994 to include limited access right-of-way work in the scope of work subject to local consent.

C. The Legislature Changed MCL 247.183 To Require Local Consent For Limited Access Highway Utility Work.

Prior to 1989, MCL 247.183 authorized a public utility company to construct under a public road a utility line running through a municipality so long as the company acquired local municipal consent:

> Sec. 13. Telegraph, telephone, power, and other *public utility companies*, and cable television companies and municipalities *are authorized to enter upon, construct and maintain* telegraph, telephone or power lines, *pipelines*, wires, cables, poles, conduits, sewers and like structures *upon, over, across, or under any public road, bridge, street or public place* and across or under any of the waters in this state, with all necessary erections and fixtures therefor. *Every* such telegraph, telephone, power, and other *public utility company*, cable television company and municipality, *before any of the work of such construction and erection shall be commenced, shall first obtain the consent of the duly constituted authorities of the city, village, or township through or along which said lines and poles are to be constructed and erected.* (emphasis added)

Former MCL 247.183 as amended by 1972 PA 268. Undoubtedly, under the pre-1989 version of the statute, any work under public roads and places running through a municipality required municipal consent.

In 1989, the legislature amended MCL 247.183 to address longitudinal use of limited access highway rights-of-way. The revised statute provided:

> Telegraph, telephone, power, and other public utility companies, and cable television companies and municipalities are authorized to enter upon, construct and maintain telegraph, telephone, or power lines, pipelines, wires, cables, poles, conduits, sewers and like structures upon, over, across, or under any public road, bridge, street, or public place, *except longitudinally within limited access highway rights of way*, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.
>
> The *state transportation department may permit* a utility as defined in 23 CFR 645.105(m) to enter upon, construct, and maintain utility lines and structures, longitudinally within limited access highway rights of way in accordance with standards approved by the state transportation commission. Such lines and structures shall be underground or otherwise constructed so as not to be visible. The standards shall conform to governing federal laws and regulations and may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights of way. The imposition of such reasonable charges constitutes a governmental function, offsetting a portion of the capital and maintenance expense of the limited access highway, and is not a proprietary function. All revenue received under this subsection shall be used for capital and maintenance expenses incurred for limited access highways. (emphasis added)

Former MCL § 247.183 (1) and (2).

The 1989 language used the word "except" to exclude limited access highway right-of-way work from the local consent requirement. At the same time, the 1989 amendment added subsection (2) delegating to the "state transportation department" the

power to permit use of these rights-of-way. Subsection (2) also required compliance with state standards conforming to federal laws and authorized charges for use of the rights-of-way.

In 1994, the legislature changed the statute again. See the current text of MCL 247.183, *supra*. Subsection (1) now includes, not excludes, limited access highway right-of-way work from the local consent requirement. The Legislature changed the meaning of the statute by replacing the word "except" with the word "including." As the word "except" in the 1989 language eliminated the local consent requirement for limited access rights-of-way work, the word "including" in the 1994 language added this work to the local consent mandate. At the same time it added the limited access rights-of-way work to the work requiring local consent, the 1994 amendment deleted the 1989 language in subsection (2) that expressly delegated authority to the state transportation department to grant permission to utilities to use limited access highway rights-of-way.[14]

Wolverine argues the words may have changed, but the meaning has not. The meaning of these two words, however, could not be more opposite. "Except" means to exclude from the whole. "Include" means to take in as part of the whole. Words do matter. When the legislature changed the words of subsection (1), it changed the meaning too The glaring change in language and meaning is unmistakable.

Wolverine cannot explain away the direct import of the language change. Yet, Wolverine speculates the Legislature replaced the word "except" with the word

"including" to erase any confusion between subsections (1) and (2) and make clear public utility companies are permitted to use limited access highway rights-of-way. But the Legislature, consistent with Const art 7, § 29, may have simply decided to give municipalities consent powers over limited access highway work as is required of other work. Why speculate? The obvious language used suggests the Legislature intended to subject limited access right-of-way work to the local consent requirement. The Legislature could have easily excepted limited access highway rights-of-way work from the consent requirement by explicitly saying so, like it did in 1989. It did not. While the intent of the language change can always be questioned, the plain meaning of the language change is unequivocal. The new language positively says a public utility's limited access highway right-of-way work requires local consent.

D. Both MCL 247.183(1) And MCL 247.183(2) Apply To This Case

Both subsection (1) and subsection (2) apply to Wolverine's proposed pipeline under I-96 through the City. Subsection (1) applies because Wolverine is a "public utility" within the meaning of the statute and the proposed pipeline would be constructed in a limited access highway running through the City. Under subsection (1), the local consent requirement applies.

Subsection (2) applies for two reasons. First, subsection (1) subjects limited access right-of-way work to subsection (2). Second, subsection (2) says a utility defined

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[14] Arguably, the state transportation department implicitly retained its power of consent pursuant to its authority to promulgate standards conforming to federal laws. The statute, however, no longer expressly requires the consent of the state transportation department.

in 23 CFR 645.105 may construct utility lines within limited access highway rights-of-way in accordance with the state's standards. 23 CFR 645.105(m) defines utility to mean:

> *Utility* – a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, *which directly or indirectly serves the public*. The term utility shall also mean the utility company inclusive of any wholly owned or controlled subsidiary. (emphasis included).

23 CFR 645.105(m)

As a company proposing to build a pipeline to transport liquid petroleum which "directly or indirectly serves the public", Wolverine is a utility within the meaning of 23 CFR 645.105. As a "public utility" under subsection (1) and as a "utility" under subsection (2), Wolverine must comply with the requirements of both subsection (1) and (2).

Wolverine tempts the Court to speculate as to why the Legislature referred to "public utility" companies in subsection (1) and a federal definition of utility in subsection (2). Wolverine argues the use of separate words describing utilities in subsection (1) and subsection (2) means limited access highway right-of-way work does not require local consent. This argument, however, contradicts the plain language of subsection (1). Furthermore, Wolverine's self-serving argument is pure guesswork. The Legislature may have seen these terms as synonymous. A "public utility" is

characterized by "public service" subject to governmental regulation and "utility" under 23 CFR 645.105(m) is characterized by direct or indirect service to the public. Even though the scope of "public utility" and "utility" appear to be quite synonymous, whether they are is immaterial to this case.[15] Wolverine is surely included within the scope of both terms. For purposes of this case, all that matters is Wolverine is a public utility under subsection (1) and subsection (1) requires the City's consent before Wolverine builds its pipeline.

Wolverine argues subsection (2) independently enables a "utility" under 23 CFR 645.105(m) to install facilities in limited access highways without local consent. Under Wolverine's theory, any public utility covered by 23 CFR 645.105(m) avoids local consent requirements. Nothing in subsection (2) however, exempts a company which is also a "public utility" under subsection (1) from the local consent requirement. If the Legislature intended to excuse public utility companies performing limited access highway work from local consent requirements, it could have said so in either subsection (1) or (2). It did not. The Legislature made its choice, the Court should not change it.

E. The Court Should Declare What the Law Plainly Says Rather Than Stray Into Legislative Analyses.

Wolverine's proposed I-96 work in Lansing is squarely within the letter of MCL 247.183(1). Therefore it is subject to local consent. The Legislature passed the simple language of the statute. The Governor signed it. It is law. End of this case.

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[15] If the Court concludes the scope of "public utility" under subsection (1) is narrower than the scope of "utility" under 23 CFR 645.105(m), it is possible a company qualifying as a 23 CFR 645.105(m) utility may not fit within the scope of "public utility"
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Wolverine invites the Court to revise MCL 247.183 in the name of legislative historical analysis. Wolverine argues if the legislature intended to increase the local consent power when it amended the statute in 1994, there would be some reference in the legislative history to that effect. Not necessarily so. Given the minimal legislative history available in Michigan concerning the enactment of statutes, there is no telling what deal may have been struck to gather sufficient votes to pass the amendment. The 1994 amendment capped the charges the Michigan Transportation Commission could impose for the use of limited access highway rights-of-way. In exchange for the new cap on fees charged for use of the limited access highways, some legislators may very well have demanded a local consent requirement. It is the duty of the Court to declare what the law says, not speculate on what may have happened behind closed doors in the legislature. "It is the law that governs, not the [subjective] intent of the lawgiver". Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), p 17.

As expressed in the direct language of MCL 247.183, the legislature apparently decided pipeline companies like Wolverine must secure a city's consent before building a pipeline through the city. It is not the role of the Court to second guess the wisdom of this legislative policy choice and rewrite the law. *Koontz, supra,* p 319. And the Court does not resort to legislative history to cloud statutory text that is clear. *Kenneth Henes Special Projects Procurement, Mktg, & Consulting Corp v Continental Biomass Indus (In re Certified Question)*, 468 Mich 109, 117; 659 NW2d 597 (2003) citing *Chmielewski v*

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under subsection (1). Consent may not be required in such a hypothetical case. This case, however, does not fit those circumstances.

Xermac, Inc, 457 Mich 593, 608; 580 NW2d 817 (1998). The Legislature has the power to make a policy change and again amend MCL 247.183. Wolverine's appeal properly belongs before the Legislature, not the Court.

CONCLUSION

For the above reasons, the Michigan Municipal League respectfully requests the Supreme Court to affirm the Court of Appeals by declaring Wolverine must acquire the City's consent before building a liquid petroleum pipeline in the I-96 right-of-way running through the City.

Respectfully submitted,

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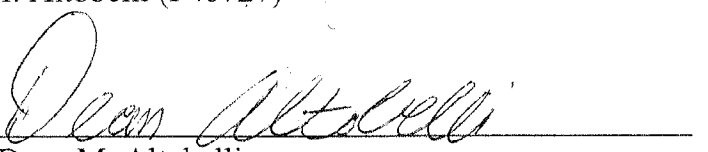
By: 
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