

Drawing More Than Oil from the Bakken Formation: Sandpiper Pipeline Draws Attention to Certificate of Need Rules and Intervenor’s “Practically Impossible” Burden of Proof

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Introduction

The Sandpiper pipeline is a hotly debated light crude oil pipeline project slated to go through northern Minnesota. Despite the controversy, the Minnesota Public Utility Commission (PUC) conditionally granted a certificate of need (CN) for the Sandpiper pipeline by a unanimous vote. The public, however, did not unanimously accept the PUC’s decision. The following day an estimated 5,000 people marched through downtown Saint Paul protesting the pipeline.² Many protesters vehemently oppose construction of any new oil transportation infrastructure, not just the Sandpiper pipeline, due to climate change concerns. Bill McKibben, founder of the climate action group 350.org, participated in the protest and “call[ed] Minnesota ‘ground zero’ of the climate fight.”³ Some commentators argue that this type of extremism explains “why Sandpiper Pipeline opponents lost big.”⁴

Intervening parties in opposition to the Sandpiper proposal, however, did not take such an extreme stance. Acknowledging the possible advantages of pipelines, environmental intervenors explicitly stated that the organizations were not anti-pipeline.⁵ Instead, intervenors called for the consideration of alternative routes and adequate environmental review. But the intervenors’ request to consider alternative routes, while more modest than climate change activists’ anti-pipeline aspirations, could not meet the burden of proof standard in the current CN rules. Minn. R. 7851.0120 creates a “practically impossible” standard set for intervenors seeking to propose more reasonable and prudent alternatives.⁶

The Commissioners appear to have recognized the difficulty of this burden because one of the conditions they imposed for granting the CN for the Sandpiper project was opening a

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² Liz Sawyer, *Pipeline Protest Draws Marchers to St. Paul*, STAR TRIBUNE, June 7, 2015, available at <http://www.startribune.com/pipeline-protest-draws-large-crowd-to-st-paul/306373801/>.

³ *Id.*

⁴ Tom Dennis, *OUR OPINION: Why Sandpiper Pipeline opponents lost big*, GRAND FORKS HERALD (June 9, 2015), <http://www.grandforksherald.com/opinion/our-opinion/3762330-our-opinion-why-sandpiper-pipeline-opponents-lost-big>.

⁵ Transcript of Oral Arguments at 98, In the Matter of the Application of North Dakota Pipeline Company, LLC for a Certificate of Need for the Sandpiper Pipeline Project (June 3, 2015) (MPUC Docket No. PL-6668/CN-13-473) and In the Matter of the Application of North Dakota Pipeline Company, LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project (June 3, 2015) (MPUC Docket No. PL-6668/PPL-13-474) (“I want to begin by making it clear that Carlton County Land Stewards does not fall into the category of intervenors whose mission it is to stop the flow of oil out of the Bakken fields. We are not here to argue that this Commission is situated to deal with climate change and so on.”) [hereinafter Oral Arguments]. *Id.* at 149 (“Friends of the Headwaters is not an anti pipeline organization and we have never taken the position that a no build is preferable. Rather, we’ve always taken the position that there are alternative routes that are in the state’s interest to consider.”).

⁶ Transcript of Deliberations at 70, In the Matter of the Application of North Dakota Pipeline Company, LLC for a Certificate of Need for the Sandpiper Pipeline Project (June 5, 2015) (MPUC Docket No. PL-6668/CN-13-473) and In the Matter of the Application of North Dakota Pipeline Company, LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project (June 5, 2015) (MPUC Docket No. PL-6668/PPL-13-474) [hereinafter Deliberations]

docket to exam the CN rules.⁷ The intent of this article is to use the Sandpiper pipeline as a case study for examining the current rules so readers can reach their own conclusions and, if they are so inclined, participate in the public comment period of the upcoming docket. The article begins by providing background information about the Sandpiper pipeline, followed by an examination of the rule, and ultimately concludes with a brief discussion of possible amendments.

Background

The Sandpiper pipeline is a proposed \$2.6 billion, 616 mile interstate pipeline project transporting 225,000 barrels per day of light crude oil from the Bakken formation in North Dakota through Clearbrook, Minnesota to Superior, Wisconsin.⁸ North Dakota Pipeline Company (NDPC), a “joint venture between Enbridge Energy Partners, L.P. and Williston Basin Pipeline LLC, a wholly-owned indirect subsidiary of Marathon Petroleum Corporation (Marathon),” proposed the pipeline.⁹

In order for a pipeline to be constructed, the applicant needs both a CN and a route permit. Typically these proceedings are carried out concurrently due to a statutory preference for contemporaneous proceedings; however, the statute acknowledges the potential need for an exception due to unique circumstances.¹⁰ The PUC denied the first two requests to separate the CN and route permitting proceedings, but approved the third request. As the joint proceedings became more complex, Commissioners found intervenors’ argument more persuasive and eventually agreed that bifurcating the proceeding would reduce public confusion.

The bifurcation disappointed not only NDPC, but the Polk County Board of Commissioners.¹¹ Polk County’s letter of support notes, “All of our counties have had Enbridge pipelines pass through our jurisdictions for 65+ years, so we know full well the benefits and risks. We have heard from our citizens and gotten detailed information from the company about this project. Together, we submit these resolutions and letters of support for the Sandpiper Pipeline Project.” According to Polk County Board of Commissioners, bifurcation will needlessly delay counties from reaping the benefits of “jobs, increased economic activity, and tax dollars” provided by the project.¹²

A total economic output of \$609,187,632 is anticipated annually.¹³ The Minnesota portion of the pipeline alone is expected to cost \$1.2 billion and traverse 302 miles.¹⁴ Minnesota would benefit from property taxes anticipated to be about \$24.9 million annually with the potential of growing to \$37.1 million in 2025.¹⁵ Some of the project’s materials would be

⁷ *Id.* at 112.

⁸ Reply Brief–Proposed Findings, at ¶ 10 (Mar. 13, 2015) (eDocket No. 20153-108197-02).

⁹ Report–ALJ ‘s Findings of Fact, Summary of Public Testimony, Conclusions of Law, and Recommendations, at ¶ 1 (Apr. 13, 2015) (eDocket No. 20154-109233-01).

¹⁰ Minn. Stat. § 216B.243, Subd. 4

¹¹ Polk County Board of Commissioners, Letter of Support (Nov. 4, 2014) (eDocket No. 201411-104556-01).

¹² *Id.*

¹³ Report–ALJ ‘s Findings of Fact, Summary of Public Testimony, Conclusions of Law, and Recommendations, at ¶ 285 (Apr. 13, 2015) (eDocket No. 20154-109233-01) [hereinafter ALJ Findings].

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 288.

purchased locally and unemployment in the project area would be temporarily reduced.¹⁶ During the first year, the project will result in the creation of about 2,513 jobs and \$178,755,775 of labor income.¹⁷ The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO intervened on behalf of NDPC, noting that about 1,500 of their members would gain six to eight months of employment with each employee expected to earn roughly \$100,000 during that time.¹⁸ The Minnesota Chamber of Commerce also intervened, pointing to the 7.64% unemployment rate in the region of the proposed route versus the state average of 4.6%.¹⁹ Greater North Dakota Chamber²⁰ and Laborers' District Council of Minnesota and North Dakota²¹ intervened for similar reasons.

Proponents argue that pipelines not only create jobs and stimulate local economies, but also provide a safer means of transporting oil than rail or trucks.²² The Cities of Elk River²³ and Independence²⁴ submitted letters of support due to concerns over increased rail traffic in their communities. However, during oral argument, Commissioner Lange made a point to establish the fact that the Sandpiper pipeline will not necessarily improve rail congestion problems.²⁵ The pipeline could end up serving as an additional means of oil transportation, simply increasing the amount of oil that can be transported from the Bakken rather than alleviating rail traffic congestion and safety concerns.²⁶

Opponents are skeptical of the purported pipeline safety due to a record of oil spills.²⁷ Enbridge Energy Partners owned the pipeline that leaked more than 800,000 gallons of oil into the Kalamazoo River.²⁸ In addition to failing to prevent the leak, Michigan Governor Granholm characterized Enbridge's response as "wholly inadequate."²⁹ Almost two years to the day after the Kalamazoo spill, an Enbridge pipeline in Wisconsin leaked more than 1,000 barrels of oil.³⁰ Former Massachusetts Representative Ed Markey remarked, "Enbridge is fast becoming to the

¹⁶ *Id.* at ¶ 286–87.

¹⁷ *Id.* at ¶ 285.

¹⁸ United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Petition for Intervention, at 4 (Aug. 26, 2014) (eDocket No. 20148-102526-01).

¹⁹ Minnesota Chamber of Commerce, Petition to Intervene, at 4 (June 11, 2014) (eDocket No. 20146-100359-01).

²⁰ Greater North Dakota Chamber, Petition for Intervention, at 2 (Aug. 27, 2014) (eDocket No. 20148-102583-01).

²¹ Laborers' District Council of Minnesota and North Dakota, Petition for Intervention (June 30, 2014) (eDocket No. 20146-100981-01).

²² Diana Furchtgott-Roth, *Pipelines are Safest for Transportation of Oil and Gas*, MANHATTAN INSTITUTE FOR POLICY RESEARCH (June 2013), available at http://www.manhattan-institute.org/pdf/ib_23.pdf

²³ City of Elk River, Letter of Support (June 1, 2015) (eDocket No. 20156-111162-01).

²⁴ City of Independence, Letter of Support (June 4, 2015) (eDocket No. 20156-111141-01).

²⁵ Oral Arguments, *supra* note 5, at 71–72 (“[O]verpromising that the Sandpiper Pipeline will alleviate rail congestion is something we need to guard against. Because we don't know that, in fact, that will occur. It's very dependent on the other supplies coming out of the Bakken and where those are headed... this isn't, as I said, going to magically make the rail congestion problems in Minnesota improve dramatically if this pipeline project goes ahead.”).

²⁶ *Id.* See Commissioners' discussion about the impacts on rail congestion in Deliberations, *supra* note 6, at 61–67.

²⁷ See *Chronology of coverage concerning oil spills*, N.Y. TIMES, available at http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/index.html.

²⁸ Emma Graves Fitzsimmons, *Michigan Governor Warns of Oil Spill Threat*, N.Y. TIMES (July 28, 2010), available at http://www.nytimes.com/2010/07/29/us/29michigan.html?_r=0.

²⁹ *Id.*

³⁰ Reuters, *Company Plans Repairs After Wisconsin Oil Spill*, N.Y. TIMES (July 29, 2012), available at <http://topics.nytimes.com/2012/07/30/business/after-wisconsin-oil-spill-enbridge-plans-pipeline-repairs.html>.

Midwest what BP was to the Gulf of Mexico, posing troubling risks to the environment.”³¹ To address these types of concerns, Enbridge promised to monitor for possible releases of oil through system monitoring by Enbridge Control Center, visual surveillance, frequent line balance calculations, and computational pipeline monitoring³² and will work to avoid a possible release during the construction phase by having “inspection staff visually inspect every weld and perform x-ray or ultrasonic inspections on all field welds.”³³

Despite these safety measures, opponents are still concerned about the risk a pipeline in the proposed region may pose for the headwaters of the world’s fourth longest river and numerous wild rice producing lakes. Carlton County Land Stewards,³⁴ Friends of the Headwaters,³⁵ Honor the Earth,³⁶ and White Earth Band of Ojibwe³⁷ intervened in opposition to NDPC’s application for a CN. Carlton County Land Stewards (CCLS) is a grassroots group dedicated to protecting farmland in Carlton County. Friends of the Headwaters (FOH) is a group of Hubbard County citizens concerned about the well-being of Lake Itasca, the headwaters of the Mississippi River, and other lakes in proximity to the proposed route. Honor the Earth and White Earth Band of Ojibwe seek to defend their usufructuary rights, which, even though the proposed route does not cross through reservation land, gives them the right to use and benefit from the land through such things as harvesting wild rice from lakes in the region. Honor the Earth and White Earth point out that an oil spill would impair, if not completely destroy, this right.

Intervenors proposed alternative routes that would avoid areas they argue are pristine and sensitive. Commissioner Wergin pointed out that “there is more necessary than to put a line on a map and call it a pipeline route,”³⁸ stressing the intent of Minn. Rule 7851.0120(B) is to prevent unreasonable alternatives. However, both the MPCA and DNR supported an alternative route proposed by FOH. Nonetheless, Administrative Law Judge (ALJ) Eric Lipman determined that intervenors did not satisfy the burden of proof required under Minn. Rule 7851.0120(B).³⁹ Consequently, the ALJ recommended the CN for NDPC’s proposed project be granted.

Kathryn Hoffman, attorney for FOH, points out the danger of such a demanding burden of proof for intervenors:

The fundamental assumption that the public has a role to play in the siting of pipelines has been placed at risk by the ALJ’s opinion, which states clearly and unequivocally that the PUC should not, cannot consider alternatives unless that alternative proposal is the type of proposal that only a pipeline company itself can bring forth. The ALJ found that because there was no party in the proceeding willing to build a pipeline at an alternative location or able to sign contracts to deliver oil on an alternative pipeline, these alternative locations could not be

³¹ *Id.*

³² ALJ Findings, *supra* note 14, at ¶ 225.

³³ *Id.* at ¶ 222.

³⁴ Carlton County Land Stewards, Petition to Intervene (Aug. 28, 2014) (eDocket No. 20148-102617-01).

³⁵ Friends of the Headwaters, Petition for Intervention, at 3 (May 5, 2014) (eDocket No. 20145-99195-02).

³⁶ Honor the Earth, Petition to Intervene, at 5–8 (Mar. 11, 2014) (eDocket No. 20143-97200-01).

³⁷ White Earth Band of Ojibwe, Petition to Intervene, at 4–9 (May 1, 2014) (eDocket No. 20145-99115-01).

³⁸ Deliberations, *supra* note 6, at 72.

³⁹ ALJ Findings, *Supra* note 14.

seriously considered. The result of the ALJ's conclusion is that the company alone is empowered to choose the location for its pipeline, and if the company refuses to suggest or support alternative locations, they can't be considered. And if this is the case and if this Commission accepts the ALJ's findings, then henceforth moving forward, neither the public nor the state has any role to play in the chosen corridor of a pipeline because the burden of proof is simply too great a lift for a citizens group or even a state agency.⁴⁰

Ms. Hoffman's concerns were acknowledged by Commissioner Lipschultz, who stated, "I understand why the burden of proof under our rules, which have been around a long time, is on those who would propose prudent or reasonable alternatives. But as I think we found out on this record, that's a really difficult if not impossible burden for anyone other than a pipeline company to meet."⁴¹

The PUC was not bound by the ALJ decision, but the Commission adopted the ALJ report with modifications. Commissioner Lipschultz's questions/comments during oral argument and deliberations suggested he believed a more reasonable or prudent alternative could exist.⁴² Despite validation from one commissioner and two agencies, intervenors failed to demonstrate "by a preponderance of evidence on the record," as articulated in Minn. R. 7851.0120(B), that any of the proposed alternative routes were "more reasonable and prudent."⁴³ Ultimately the CN was granted, but the Commission acknowledged the difficult burden of proof placed upon intervenors by conditioning the CN on the opening of a docket to examine the current rule. Commissioner Lipschultz stated, "And I'd like, as a condition of granting this, to start a process and put a process in place that will really make sure we take a look at those rules, the rule criteria we're applying today, to make sure that they are fully reflective of the statute and that they are fully operational and fair to all the parties, including intervening parties who may have an interest in any number of these proceedings down the road."⁴⁴

Current Rule

Minnesota's current rule sets out four basic elements for granting a CN. The sub-elements articulate the burden of proof required for establishing each individual element. Elements A and C must be demonstrated by the applicant, but intervenors bear the burden for element B. According to Minn. R. 7851.0120,

A certificate of need shall be granted to the applicant if it is determined that:

A. the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states, considering:

⁴⁰ Oral Arguments, *supra* note 5 at 126–127.

⁴¹ *Id.* at 105.

⁴² Deliberations, *supra* note 6, at 110–11 ("I just don't want to foreclose a route that the Department has said is viable and it's the only route on this record, it seems to me, would avoid the headwaters of the Mississippi.")

⁴³ *Id.* at 132.

⁴⁴ *Id.* at 105–106.

- (1) the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility;
- (2) the effects of the applicant's existing or expected conservation programs and state and federal conservation programs;
- (3) the effects of the applicant's promotional practices that may have given rise to the increase in the energy demand, particularly promotional practices that have occurred since 1974;
- (4) the ability of current facilities and planned facilities not requiring certificates of need to meet the future demand; and
- (5) the effect of the proposed facility, or a suitable modification of it, in making efficient use of resources;

B. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of evidence on the record by parties or persons other than the applicant, considering:

- (1) the appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;
- (2) the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;
- (3) the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and
- (4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives;

C. the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate, considering:

- (1) the relationship of the proposed facility, or a suitable modification of it, to overall state energy needs;
- (2) the effects of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effects of not building the facility;
- (3) the effects of the proposed facility, or a suitable modification of it, in inducing future development; and
- (4) the socially beneficial uses of the output of the proposed facility, or a suitable modification of it, including its uses to protect or enhance environmental quality; and

D. it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.⁴⁵

Element A, concerning energy supply, calls for evidence demonstrating the adverse effect resulting from denial of the CN *to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states*. One potential criticism of current rule is that such a broad assemblage would seemingly guaranty an applicant the ability to establish an adverse effect for at least one of the stated groups. Projects that do not benefit the state of Minnesota, but pose risks to the state could still fulfill the requirements of element A. Element C, concerning a comparison

⁴⁵ Minn. R. 7851.0120.

of the societal consequences of a pipeline versus no pipeline, may also have shortcomings. The no pipeline option leaves rail or trucks as the only remaining means to transport oil. Considering the number of train derailments in the news recently,⁴⁶ many argue pipelines are a safer, societally superior method of transport. Once an applicant establishes these elements, the endpoints of the route are essentially set and intervenors cannot suggest alternative routes with different endpoints.

By establishing arguably minimal requirements for applicants to demonstrate a need, the current rules place the burden upon intervenors to prove another route is better. Essentially, once the applicant has met the need criteria, “it is up to others to demonstrate by a preponderance of the evidence that a more reasonable and prudent alternative exists.”⁴⁷ Kathryn Hoffman, attorney for FOH, stated during oral arguments, “[W]e oppose the process as outlined because it is coercive and puts the burden on the public rather than Enbridge and NDPC or the regulatory agencies to demonstrate that the route ultimately chosen is the most reasonable and prudent alternative.” Commissioner Lange also expressed trouble with the current burden of proof standard, “I think I’ve struggled with that because our rules say that once the applicant has put out a proposal, it is up to those who oppose the proposal to come up with alternatives and justify those. And so I think, you know, all of us are wrestling with how opponents would meet that burden.”⁴⁸

The Department of Commerce, which supported the adoption of the ALJ report with modification, also acknowledged the “possible flaws” in the CN rule. During oral arguments, Deputy Commissioner Bill Grant answered a number of questions asked by Commissioner Lipschultz regarding the very issue:

Commissioner Lipschultz: You've heard and read the briefs and exceptions of the other parties, the other intervenors. And one thing they said that continues to roll around in my head is when it comes to item B in the Commission's decision criteria, you and I just talked about A and C, the burden under our rules on intervenors to prove up by a preponderance of the evidence a reasonable and prudent alternative creates an impossible barrier for anyone other than a pipeline company. Do you think that they're right, in that that is a significant flaw in our rules that prevents us perhaps from evaluating all of the alternatives that perhaps should be considered in the context of a certificate of need proceeding?

Deputy Commissioner Grant: Madam Chair and Commissioner Lipschultz, that is something that we're actually taking a very close look at, because we are concerned about the uneven treatment of parties in these proceedings. Really that's not something that's limited to pipeline proceedings. As an example, there is in state law provisions for intervenor compensation in other energy matters that come before you. My own view is that statute is way too limited to provide

⁴⁶ Isaiah Thompson, *Small Derailment Fuels Bigger Fears Around Grafton Propane Facility*, NECIR (June 17, 2015), available at <http://necir.org/2015/05/20/rail-safety-fact-check/>.

⁴⁷ Reply Brief–Proposed Findings, *supra* note 8, at ¶ 23.

⁴⁸ Oral Argument, *supra* note 5, at 187.

meaningful assistance to intervenors to put them on a level playing field with applicants, and I think it's something we should be looking at across the board.

Commissioner Lipschultz: Do you think that those, or at least some of those other system alternatives should have been given more consideration in this docket, and that the reason they weren't was because of this burden that's really on those proposing them, that's kind of a tough burden for anyone other than a pipeline company to meet?

Deputy Commissioner Grant: Madam Chair and Commissioner Lipschultz, apart from the analysis that we did at your request, you know, I really have not formed a view of some of the other system alternatives. We were really hamstrung by the fact that we did not have comparable environmental data with which to evaluate some of those alternatives as they might affect other states. And for that reason, I probably wouldn't say more than that at this point. But it's certainly possible that what you're saying is true and that it is another example of how our rules are somewhat flawed in this area.⁴⁹

Changing the Rule

Commissioner Lipschultz explained that “it's practically impossible for anyone other than a pipeline company to essentially have a proposal with engineering and financial details all worked out, that it's, at the end of the day, almost impossible for anyone other than a pipeline company to meet the burden under item B of the rule,” yet the “Commission d[id] not find that only a pipeline developer is in a position to offer alternatives that would be sufficient to meet the burden of proof under item B.”⁵⁰ These seemingly conflicting statements suggest that the finding may be more aspirational than actual. Presumably, the intent of the docket for examining the rules is to ensure the rules reflect this finding or policy goal.

CCLS attorney Jerry Von Korff remarked, “NDPC’s assertion that it is the burden of other parties to demonstrate the existence of superior alternatives is inconsistent with Minnesota environmental law.”⁵¹ Intervenors’ solution is to require greater environmental review. “If the pipeline project were scrutinized by a full environmental impact statement (EIS), Enbridge and NDPC would have the burden of proof to show that the ultimate project design, location and future operation of the proposed pipeline met the test of being the most reasonable and prudent alternative including the ‘no action’ alternative.”⁵²

Distinguishing the level of review for the CN versus route approval is an unusual issue since most proceedings occur simultaneously. The bifurcation of the Sandpiper case raised the question of what kind of environmental review should occur at the CN phase. While intervenors argue for an EIS, Commissioner Heydinger explains the limitations of such an approach:

⁴⁹ Oral Argument, *supra* note 5, at 249–251.

⁵⁰ Deliberations, *supra* note 6, at 70.

⁵¹ Reply Brief – Proposed Findings, Conclusions and Recommendations for Carlton County Land Stewards at ¶ 235 (Mar. 13, 2015) (eDocket No. 20153-108200-02).

⁵² *Id.*

Essentially when an application is made we're looking at the size, type, and timing. What is it the Applicant is proposing, have they demonstrated that the project that they're proposing of the size, the type, and the timing is needed, did they have commitments that demonstrated that. And we typically look to see is there unused capacity in other lines or somehow suggest that we don't need to commit to the building or construction of other infrastructure. Is the infrastructure of our trains or our roads sufficient to meet this need or not. And I guess what I'm hearing today is confusing to me. Because at that level, yes, there is an environmental review that needs to be done, what would be the impact of, you know, building a new pipeline as opposed to using existing lines or using roads, using trucks. But to my way of thinking, the kind of granular analysis that the parties are looking for here is really only applicable once we've decided there's a need to construct a pipeline.⁵³

Because determining the environmental impact of a pipeline is difficult when the location is unknown, Commissioner Heydinger argues that the route permitting stage is more appropriate for the level of environmental review intervenors seek.

Another option to contemplate involves narrowing the group considered in element A. One argument for opposing the Sandpiper pipeline is the fact the proposed pipeline provided no direct benefits to the State of Minnesota. While restricting the group considered in the CN analysis would increase the burden upon applicants by requiring that Minnesota have a direct benefit, such restriction could raise dormant commerce clause issues because, it could be argued, such a requirement negatively impacts interstate commerce. However, having applicants demonstrate a local need will not necessarily conflict with the commerce clause. In *Lakehead Pipeline Company v. Illinois Commerce Commission*,⁵⁴ the court held, "A local public need was one method of proving need as contemplated by the statute, but the Commission did not rule out interstate necessity. Accordingly, we find no constitutional infringement...[The Commission's] enforcement of the Pipeline Law does not cause it to improperly intrude into the realm of interstate commercial regulation."⁵⁵ Nevertheless, this is a complicated issue that could result in lawsuits against Minnesota.

Providing for intervenor compensation is another idea. Minnesota already has a statute, but with limited applicability.⁵⁶ California also has a statute allowing intervenors to "be compensated for making a substantial contribution to proceedings of the commission, as determined by the commission in its orders and decisions."⁵⁷ "Substantial contribution" may not be a clear standard, but intervenors have recovered fees and costs.⁵⁸ A compensation scheme may empower intervenors to conduct the level of analysis for proposed alternatives needed to fulfill the current burden of proof.

⁵³ Oral Arguments, *supra* note 5, at 159–60.

⁵⁴ 696 N.E.2d 345 (Ill.App. 3 Dist. 1998).

⁵⁵ *Id.*

⁵⁶ See Minn. Stat. § 216B.16, Subd. 10. See also Minn. R. 7831.

⁵⁷ Cal. Pub. Util. Code § 1801.3.

⁵⁸ *Southern California Edison Co. v. Public Utilities Comm'n*, 117 Cal.App.4th 1039 (2004).

There are several ways to amend the CN rules to address burden of proof concerns highlighted in the Sandpiper case. Further evaluation and discussion of the rules by the PUC may indicate that the burden of proof concerns are unwarranted or inconsequential. Conversely, modifications may need to be made to address future pipeline projects proposed in Minnesota. Either way, the PUC is cognizant of potential flaws with the rules and will be seeking input. The rule examination docket could also provide an opportunity to consider additional issues beyond intervenors' burden of proof. The ALJ argued that "a Certificate of Need proceeding is not an appropriate forum to resolve the much larger questions as to what are safe levels of fossil fuel consumption, or whether some areas of the state should be free from utility corridors."⁵⁹ Whether or not one agrees with the ALJ, the docket creates such an opportunity for those concerns to be discussed and possibly incorporated into the rules.

Conclusion

Intervenors failed to stop the PUC from granting a CN for the Sandpiper pipeline, but did draw attention to potential issues with the CN rules, including the "practically impossible" burden of proof placed upon intervenors by Minn. R. 7851.0120(B). The Commission will open a docket to discuss this burden and other potential concerns with the current rules. The docket may even provide a forum for climate change activists to make a case for limiting fossil fuel consumption when defining need or for environmentalists to create regions explicitly safeguarded from the risks posed by pipelines. Regardless of one's position on these issues, the public will have the opportunity to influence the future siting of pipelines by participating in the discussion of the rules that is going to be initiated by the PUC.

⁵⁹ ALJ Findings, *Supra* note 14, at 102.