STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1866

Enbridge Energy, Limited Partnership,
a Delaware limited partnership; et al., petitioners,
Respondents,

vs.

Donovan D. Dyrdal, et al.,
Appellants,

Choice Financial Group-Grand Forks, et al.,
Respondents Below.

Filed August 3, 2010
Affirmed
Hudson, Judge

Pennington County District Court
File No. 57-CV-09-294

Paul B. Kilgore, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for respondents)

Jon Erik Kingstad, Oakdale, Minnesota (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellants challenge a district court order granting respondents' motion for a quick-take condemnation of a pipeline easement over a portion of appellants' land and appointment of commissioners to determine the amount of damages to be awarded to appellants. Because the scope of our review of such an order is limited to whether public necessity existed, and because we lack jurisdiction to consider that issue in this case, we affirm.

FACTS

Respondents Enbridge Energy, L.P. and Enbridge Pipelines (Southern Lights), L.L.C. are statutorily defined public service corporations qualified to do business in Minnesota. Respondents added two underground pipelines to their interstate carrier system—the LSr pipeline and the Alberta Clipper pipeline.[1] This appeal deals with the Alberta Clipper pipeline.

In June 2007, respondents applied to the Minnesota Public Utilities Commission (PUC) for a certificate of need authorizing the Alberta Clipper pipeline project, including the installation of a 36-inch diameter underground petroleum pipeline traversing approximately 285 miles in Minnesota. The PUC referred respondents' application to the Office of Administrative Hearings for a contested case hearing, directed respondents to

[1] Appellants have previously challenged the public necessity of the LSr pipeline in district court and in this court. This court rejected appellants' claims on July 28, 2009. *See Enbridge Energy, LP v. Dyrdal*, No. A08-1863, 2009 WL 2226488 (Minn. App. July 28, 2009).

work with PUC staff to develop notice materials, and requested that the Minnesota Department of Commerce (DOC) study the issues and indicate its position on the reasonableness of granting a certificate of need. Respondents sent notice of the proceedings to all affected landowners on July 30, 2007.

In August 2007, the DOC conducted the first of many public meetings and hearings regarding the Alberta Clipper pipeline. The administrative law judge (ALJ) later released his findings of fact, conclusions, and recommendations. The document included 310 findings of fact and 33 conclusions of law. Following a public hearing, the PUC adopted, clarified, and supplemented the ALJ's recommendation and granted respondents' applications for a certificate of need and routing permit for the Alberta Clipper pipeline. The ALJ and PUC made specific findings relating to the public need and necessity for the proposed pipeline and to the environmental impact of the proposed pipeline.

Appellants Donovan and Anna Dyrdal own land in Norden Township, Pennington County. The proposed route for the Alberta Clipper pipeline crosses a portion of appellants' land. Appellants filed a petition for reconsideration of the PUC's order on January 20, 2009, which the PUC denied in a final order on March 2, 2009. Appellants did not seek appellate review of the PUC's final order under Minn. Stat. § 14.63 (2008) and did not mount a district court challenge to the PUC order as a violation of the Minnesota Environmental Policy Act (MEPA) within the 30-day statute of limitations imposed by Minn. Stat. § 116D.04, subd. 10 (2008).

Respondents then moved the Pennington County district court for an order granting them a quick-take condemnation and possession of a right-of-way easement for the pipeline, and for appointment of three commissioners to determine the amount of damages to be awarded to appellants and any other persons holding an interest in the easement property. Appellants moved to dismiss respondents' quick-take petition and later moved for a continuance. On August 10, 2009, the district court denied appellants' motion to dismiss and motion for continuance, and granted respondents' petition for the right-of-way easement. Appellants appealed the district court's order to this court, arguing that the district court erred in its finding of public necessity, that Minn. Stat. § 117.189 (2008) is unconstitutional, and that respondents committed various MEPA violations.[2]

D E C I S I O N

A. Scope of Review

Respondents argue that appellants' claims are not appealable because the district court's quick-take order is not a final order, except as to its public-necessity determination.

Here, appeal is taken from an order granting respondents a quick-take condemnation and possession of an easement over a portion of appellants' land, and appointing commissioners to ascertain the amount of damages sustained by appellants. A quick-take condemnation is not a separate, self-contained condemnation proceeding, but

[2] Appellants also filed a rule 60.02 motion to vacate the district court's August 10 order, which the district court denied after this appeal was filed.

rather is a step in the condemnation proceeding. *City of Rochester v. Peoples Coop. Power Ass'n, Inc.*, 505 N.W.2d 621, 626 (Minn. App. 1993). Thus, an order granting a quick-take condemnation and appointing commissioners is an intermediate order, from which an appeal generally may not be taken. *State by Mondale v. Wren, Inc.*, 275 Minn. 259, 262, 146 N.W.2d 547, 550 (1966); *Village of Roseville v. Sunset Mem'l Park Ass'n, Inc.*, 262 Minn. 108, 110–11, 113 N.W.2d 857, 858–59 (1962). Instead, appeal should be taken from the final judgment. *Wren*, 275 Minn. at 262, 146 N.W.2d at 550.

The supreme court announced a narrow exception to this general rule in *County of Blue Earth v. Stauffenberg*, 264 N.W.2d 647 (Minn. 1978). In *Stauffenberg*, the court held that "in a condemnation proceeding where the issue of public necessity has been determined by the district court, an aggrieved party [may appeal] from the district court order." *Id.* at 650. In subsequent cases, the scope of review under this exception was expressly limited to determining the issue of public necessity. *Alexandria Lake Area Serv. Region v. Johnson*, 295 N.W.2d 588, 590 (Minn. 1980) ("We decline to extend the rule of the *Stauffenberg* case to situations beyond those involving the issue of public necessity."); *City of Duluth v. Stephenson*, 481 N.W.2d 577, 578 (Minn. App. 1992) (concluding that because *Stauffenberg* rule limits appeal from a quick-take order to a determination of public necessity, issues raised in appeal were premature), *review denied* (Minn. May 15, 1992). Therefore, the only issue which may be considered on this appeal is whether the district court erred in determining that the requisite public necessity existed. Accordingly, we do not consider appellants' constitutional and MEPA claims.

B. Jurisdiction

Respondents concede that the public-necessity issue is within the scope of this appeal but contend that, because appellants did not raise the issue of public necessity to the PUC in their application for rehearing, this court lacks jurisdiction to review the PUC's decision on that issue. Under Minn. Stat. § 216B.27 (2008), a party aggrieved by a PUC decision may apply to the PUC for a rehearing. The application for rehearing must specifically set forth the grounds for which the party contends that the PUC decision was unreasonable or unlawful. Minn. Stat. § 216B.27, subd. 2. That section states:

> No cause of action arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made. No person or corporation shall in any court urge or rely on any ground not so set forth in the application for rehearing.

Id.

Thus, presenting an issue to the PUC in an application for rehearing is a condition precedent to judicial review of that issue, and this court does not have jurisdiction to hear an issue that is not raised in an application for rehearing. *Id.*; *see also In re Matter of N. States Power Co.*, 447 N.W.2d 614, 614–15 (Minn. App. 1989) (stating that chapter 216B governs on issues of jurisdiction and that judicial review is precluded unless application for rehearing is made), *review denied* (Minn. Dec. 15, 1989).

Here, appellants applied for rehearing before the PUC. In the application, appellants argued that the PUC acted arbitrarily and capriciously in failing to require an

environmental impact statement (EIS) and that the PUC's notice relating to the condemnation did not show that multiple pipeline projects were segmented. But the application for rehearing did not raise the issue of public necessity. Therefore, appellants are precluded from seeking judicial review of the PUC's "public necessity" determination "in any court." *See* Minn. Stat. § 216B.27, subd. 2. Because the issue of public necessity was not raised in appellants' application for rehearing before the PUC, that issue is not subject to appellate review.

Even if we were to reach the merits of appellants' public-necessity argument, appellants' claim would fail. Here, the district court deferred to the findings of the ALJ and the PUC and determined that the requisite public necessity existed.[3] Before an applicant may exercise the power of eminent domain, it must establish that the proposed taking is for a public purpose. *See generally* Minn. Stat. § 117.48 (2008). "[T]here are two levels of deference paid to condemnation decisions: the district court gives deference to the legislative determination of public purpose and necessity of the condemning authority and the appellate courts give deference to the findings of the district court, using the clearly erroneous standard." *Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 381 (Minn. 2006). "Public purpose is construed broadly," and the standard for overturning a decision of the condemning authority on that ground is "very strict." *Id.* (citation omitted). "Judicial deference to a legislative determination that land being

[3] The ALJ's lengthy findings, adopted by the PUC, state that the pipeline's "primary benefit to Minnesota and the surrounding region of the projects will be increased access to crude oil supplies. [The Alberta Clipper pipeline] will directly benefit the entire Midwest, including Minnesota customers and manufacturers."

condemned is for a public use is . . . required until it is shown to involve an impossibility." *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986) (quotation omitted).

A condemning authority's determination of public necessity is regarded as a legislative decision, which will only be overturned if "manifestly arbitrary or unreasonable." *Lundell*, 707 N.W.2d at 381 (quotation omitted). A condemning authority need not determine that there is absolute necessity, only that the taking is "reasonably necessary or convenient for the furtherance of the end in view." *N. States Power Co. v. Oslund*, 236 Minn. 135, 137, 51 N.W.2d 808, 809 (1952) (emphasis and footnote omitted). "To overcome a condemning authority's finding of necessity there must be overwhelming evidence that the taking is not necessary." *Lundell*, 707 N.W.2d at 381.

Here, appellants have not shown such overwhelming evidence. The evidence instead supports a determination of public necessity, and the district court did not clearly err in deferring to the legislative determination of public purpose. As this court noted in its earlier decision regarding these parties' dispute over a different pipeline, it is the regulatory authority, with its specialized expertise, which bears the primary responsibility for determining whether public necessity exists. *See Enbridge Energy v. Dyrdal*, A08-1863, 2009 WL 2226488, at *3 (Minn. App. July 28, 2009) (citing Minn. Stat. § 216B.243 (2008); Minn. Stat. § 216G.02 (2008)).

Affirmed.