

STATE OF MICHIGAN
COURT OF APPEALS

WALTER ZAREMBA,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, and LUIGI ALBANO,

Appellees.

UNPUBLISHED
December 3, 1999

No. 210673
MPSC
LC No. 11398

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Appellant appeals as of right from an order of the Michigan Public Service Commission (PSC) denying his application for a certificate of public convenience and necessity (CPCN) under 1929 PA 9 (Act 9), MCL 483.101 *et seq.*; MSA 22.1311 *et seq.* We affirm.

Appellant filed an application with the PSC for a CPCN to construct and operate a natural gas transmission pipeline to be known as the Jordan Valley Pipeline System. The pipeline was to start at the wellhead of appellant's proposed natural gas well in Antrim County, and interconnect with the existing Lee's Petroleum Chess Play Pipeline System. Because the Chess Play pipeline was not an Act 9 transmission line and did not transport third-party gas, appellant proposed that the Chess Play pipeline be reclassified as an Act 9 transmission line. The Michigan Department of Natural Resources (DNR) intervened, and the PSC staff also elected to participate in the case.

The PSC denied appellant's application for a CPCN. The PSC found that appellant met the jurisdictional requirements of MCL 483.101; MSA 22.1311, either by claiming the right to transport gas for hire or to engage in the business of transporting gas. The PSC considered the "necessity and practicability" of the proposed pipeline to determine whether it would serve the public convenience and necessity. MCL 483.109; MSA 22.1319. The PSC concluded that the proposed pipeline project would not be economically feasible; thus, it could not determine that the pipeline would be either necessary or practicable. In reaching this conclusion, the PSC relied on the staff's analysis of the economic feasibility of the proposed project rather than that offered by appellant. The PSC determined

that the figures relating to production volume, revenue, and cost projection utilized by the staff were more appropriate than those utilized by appellant.

The standard of review for PSC orders is narrow and well established. Pursuant to MCL 462.25; MSA 22.44, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, *prima facie*, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of establishing by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). Const 1963, art 6, § 28 also applies, and provides that a final agency order must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Public Service Comm*, 206 Mich App 290, 294; 520 NW2d 636 (1994).

Initially, appellant argues that the PSC's order is unlawful and unreasonable because the PSC has only the authority granted to it by statute, *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988), and the PSC had no authority under 1929 PA 9 to require a showing of economic feasibility because public funds would not be used to subsidize the construction of the pipeline. Appellant further argues that the PSC's determination that the pipeline project was not practicable because it was not economically viable was contradicted by testimony from witnesses supporting the application. Moreover, the securing of permission to build the pipeline was a prerequisite to obtaining a permit to drill the well. Thus, appellant claims that denying the application under these circumstances is unreasonable. Finally, appellant asserts that construction of the pipeline is necessary because no other means exist to transport the gas to market. Therefore, if a pipeline is necessary and its design is practicable, appellant argues that it follows that the pipeline would serve the "convenience and necessities" of the public. MCL 483.109; MSA 22.1319.

MCL 483.109; MSA 22.1319 requires that the PSC examine the "necessity and practicability" of a proposed project as part of its evaluation of an application for a CPCN. In addition, 1979 AC, R 460.868 (Rule 18) details the type of information that must be included in an application, and contemplates an inquiry into the economic viability of a proposed project. The language of MCL 483.109; MSA 22.1319 and Rule 18 requiring a finding that a proposed project serve the "convenience and necessities" of the public before a CPCN can be issued indicates that the PSC's analysis must encompass more than the private interests of the applicant, and must include a determination of the economic feasibility of the proposed project. Appellant's assertion that because the proposed pipeline would be privately funded an analysis of the economic feasibility of the project was beyond the purview of the PSC is not supported by citation to authority. The PSC's interpretation of the statute and its own rule must be accorded deference. *Attorney General, supra*. The PSC's finding that the proposed project would not be economically viable was supported by evidence submitted by the witnesses for the staff and the DNR. This testimony constituted competent evidence to support the PSC's conclusion, notwithstanding the existence of contrary evidence presented by appellant. *Great Lakes Steel Div of Nat'l Steel Corp v Public Service Comm*, 130 Mich App 470, 481-482; 344 NW2d 321 (1983). Finally, we reject appellant's assertion that the proposed pipeline is

necessary and practicable because no other means exist to transport the gas on his land to market, and because obtaining a CPCN is a prerequisite to gaining permission to drill a well. The presence of natural gas under land does not confer on the owner thereof the automatic right to produce and market that gas. The PSC acted within its authority by considering the economic viability of the proposed pipeline project, MCL 483.109; MSA 22.1319; Rule 18. Its finding that because the proposed project was not economically viable it could not be deemed either necessary or practicable was supported by the requisite evidence. Const 1963, art 6, § 28. The PSC's order denying appellant's application for a CPCN is neither unlawful nor unreasonable. MCL 462.26(8); MSA 22.45(8).

Next, appellant argues that the PSC exceeded the authority granted to it by 1929 PA 9 when, in evaluating the application for a CPCN, it considered the environmental impact of the proposed pipeline project. Appellant claims that environmental considerations are properly addressed by other agencies.

This issue is without merit. In its order the PSC stated that because the proposed pipeline project failed "to meet the statutory standard of the public convenience and necessity solely on economic grounds," a detailed discussion of the arguments related to environmental issues was not necessary. Contrary to appellant's assertion, the PSC did not base its decision in part on environmental considerations.

Finally, appellant argues that the PSC's denial of his application for a CPCN, in conjunction with the denial by the Department of Environmental Quality (DEQ) of his application for a drilling permit, constitutes a taking of his leasehold interest for which just compensation is due. US Const, Am V; Const 1963, art 10, § 2.

We decline to address this issue for the reason that it was not raised before the PSC. We note that had the issue been raised below, the PSC would have been without jurisdiction to address it. The Court of Claims has exclusive jurisdiction over claims for money damages brought against the State of Michigan. *Silverman v University of Michigan Bd of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994).

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder