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Agency Determination Concerning Delegation of Sovereign's Pipeline Eminent Domain Power to Public Utility Interstate Pipeline Based Upon "Public Need" Comports With Dormant Commerce Clause: Substantial Evidence Review Applied to Public Need Determination.

Lakehead Pipeline Company v. Illinois Commerce Commission

S. Ellyn Farley*

I. INTRODUCTION

On April 7, 1998, the Appellate Court of Illinois, Third District, affirmed a decision of the Illinois Commerce Commission (Commission) by holding that the Commission acted within its lawful authority in reviewing and denying the application of Lakehead Pipe Line company (Lakehead) for a certificate in good standing under section 401 of the Illinois Pipeline Law (Pipeline Law).¹ The court held that the interpretation of the Constitution by the Commission of the Pipeline Law was reasonable and did not conflict with the Commerce Clause of the United States Constitution.² The primary issue in the case was whether Lakehead would be granted eminent domain authority.³

II. PROCEDURAL HISTORY

Lakehead, a limited partnership, owns the United States portion of the longest liquid petroleum pipeline in the world, along with its Canadian affiliate, Interprovincial Pipe Line, Inc. (IPL).⁴ Lakehead and

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¹Lakehead Pipeline Company v. Illinois Commerce Commission, 1998 WL 162338 (Ill.App. 3 Dist.); (citing 220 ILCS 5/15-100 et seq (West 1996)).

²Lakehead at *1; (citing U.S. Const., art. I, sec. 8, section 3).

³Return to the Commission would have been required to actually exercise Eminent domain power. However, upon return to Commission's approval would be a mere formality concurring opinion of Chairman Pan Miller, p. 3. n.1, Lakehead opinion Nos. 96-01415.

⁴*Id.*

IPL transport crude petroleum from the Northwest Territories and the Canadian Provinces of Alberta, to petroleum refineries in the Provinces of Ontario and Quebec as well as in the Midwest United States.⁵ The 116.64 mile portion of this pipeline that lies within Illinois became active in 1969, and is referred to as Line 6A.⁶ When Line 6A was originally constructed, it did not require the use of eminent domain; rather, the land was acquired upon general rights-of-way from public utilities, as well as from easements and fee interest purchased by Lakehead from private landowners.⁷

Lakehead initiated an expansion program, System Expansion Program II, which calls for an increased transportation of crude oil by Lakehead and IPL to and through Illinois, and included the addition of new pumping stations to Line 6A.⁸ When Lakehead determined that the capacity of Line 6A had been reached, resulting in rationing during peak periods, Lakehead proposed the construction of a new pipeline, which it referred to as Line 14.⁹ According to Lakehead, the additional route, the estimated cost of which is \$300 million, would be desirable because of the significant amount of development in the municipalities along Line 6A since 1969.¹⁰ In addition, the route for proposed Line 14 would travel primarily through rural and agricultural areas.¹¹ Prior to construction of the new proposed pipe line for the transport of crude petroleum, Lakehead sought the issuance of a certificate in good standing under section 401 of the Pipeline Law, as the first step toward acquiring eminent domain authority.¹² Lakehead emphasized its intent to negotiate with landowners and municipalities along the proposed route, but warned that it may eventually need condemnation authority in order to achieve its ultimate goal.¹³

Following an extended hearing held before a Commission hearing examiner, at which numerous witnesses and exhibits were

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰Lakehead at *1.

¹¹*Id.*

¹²Lakehead at *2.

¹³Lakehead at *1-2.

presented.¹⁴ However, the the Commission rejected the examiner's recommendation and determined that Lakehead failed to demonstrate a public need for a new proposed pipe line, stating that public need must be determined by looking to the demand for refined petroleum products, not only crude oil, specifically.¹⁵ The test for public need, according to the Commission, is met by examining the need of the public at large, not by looking at the needs of any individual or number of individuals.¹⁶ The Commission found that Lakehead failed establish a public need for Line 14 because there was no support to the claim that Line 14 would have a positive price effect on the market for refined petroleum products, and it was evident that the public did not lack an adequate supply of refined petroleum at a reasonable cost.¹⁷ Lakehead's application for a certificate of good standing under section 401 of the Pipeline Law was denied, and Lakehead appealed, accompanied by amicus curiae briefs from numerous oil and pipeline companies and other organizations.¹⁸

III. APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

The Illinois Appellate Court, considered four issues: (1) whether the Commission acted within its authority; (2) whether the state or federal constitution prohibits the action of the Commission in this case; (3) whether the decision by the Commission to deny Lakehead's application was supported by substantial evidence; and (4) whether there were adequate findings made to support the Commission's decision.¹⁹ The burden of proof in this case rests with the appellant on each issue.²⁰

¹⁴The hearing examiner determined that public need had been demonstrated by reference to the need and demand for more capacity on Lakehead's system.

¹⁵Lakehead at *2-3.

¹⁶Lakehead at *3.

¹⁷A Nobel laureate testified that any barrel of oil shipped via the proposed line would simply displace crude oil which arrives from other points on the line. The only benefit it would give Lakeland was greater market share: the price of crude oil would be unaffected.

¹⁸*Id.*

¹⁹*Id.* (Citing *Citizens United For Responsible Energy Development, Inc. v. Illinois Commerce Comm'n*, 285 Ill.App.3d 82, 673 N.E.2d 1159 (1996)).

²⁰*Id.* (Citing 220 ILCS 5/10-201(d) (West 1996); *United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill.2d 1, 643 N.E.2d 719 (1994)).

A. Scope of Commission Authority

The Commission, in exercising its authority, interpreted section 401(b) of the Pipeline Law as requiring a determination of whether Lakehead met the statute's requirements, including the requirement that there be a public need for Line 14.²¹ Lakehead argued that the Commission's authority is limited in interstate pipeline cases to an exercise of "prudential control" over certification applications (which does not include the right to determine whether there is a need for Line 14) because the Commission may not regulate the interstate markets involving transportation by common carriers.²² However, the court found that the plain language of section 401(b) instructs the Commission, when reviewing certification applications, to determine if a public need exists and whether necessity requires the proposed service.²³ Section 401(b) states in pertinent part:

(b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; *a public need for the service exists*; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate."²⁴

Despite the clear legislative language, Lakehead insists, relying on the Illinois Supreme Court's decision in *Service Pipe Line Co. v. Ruder*,²⁵ that this directive of section 401(b) not only causes the Commission to exceed its lawful authority in interstate commerce cases, but also places an undue burden upon such commerce.²⁶

²¹Lakehead at *3.

²²*Id.*

²³*Id.* (Citing 220 ILCS 5/15-401(b) (West 1996)).

²⁴*Id.* (Citing 220 ILCS 5/15-401(b) (West 1996)).

²⁵19 Ill 2d 332, 167 N.E. 2d 419 (1960).

²⁶*Id.* (Citing *Service Pipe Line Co. v. Ruder*, 19 Ill.2d 332, 167 N.E.2d 419 (1960)).

1. The Ruder Decision

In Ruder, a case in which an interstate pipeline brought a condemnation action without first applying to the Commission for approval, the court concluded that, unless preempted by the Federal government, State law governs certification, which is a crucial first step in obtaining eminent domain authority.²⁷ The Ruder court held that, because federal legislation had not entirely preempted the State's authority to regulate certification applications, a State had the authority to exercise "prudential control" over the interstate activities of a utility which may implicate eminent domain authority.²⁸

Lakehead also argued that case law decided since the Ruder decision allowed the Commission to exceed the prudential control established in Ruder.²⁹ However, the court found section 401 of the Pipeline Law does not permit the Commission to exercise more than prudential control since it is sole authority in supervising and protecting the welfare of the public in matters of public utilities.³⁰ The Commission does not determine whether the pipe line should enter the market, Lakeland is free to build a pipeline without Eminent domain authority. Therefore, in accordance with section 401, the Commission must make a determination as to whether Lakehead may acquire certification for its proposed project, which would provide for the potential acquisition of condemnation authority in the future.³¹

2. Interstate Commerce

Lakehead, along with amici, maintain that the requirement to demonstrate public need pursuant to section 401(b) of the Pipeline Law, places an undue burden and discriminates against interstate

²⁷Lakehead at *3-4. (Citing Ruder, 19 Ill.2d at 335).

²⁸*Id.* at *4. (Citing Ruder, 19 Ill.2d at 335).

²⁹*Id.* at *4.

³⁰*Id.*

³¹The Court notes that it does not make a determination, per se, about whether Lakehead's proposed pipeline should enter the market. In fact, the court concedes that Lakehead could build its proposed pipeline 6A, without acquiring certification; however, in doing so, Lakehead would have no condemnation authority should the need arise, nor would it have the ability to seek such authority. *Id.*

commerce.³² While the Commerce Clause of the United States Constitution provides Congress with the broad authority to “regulate commerce...among the several states,” it does not eliminate the power of the states to regulate significant local issues.³³ In the absence of federal regulation, states and local governments may regulate even issues that implicate interstate commerce that fall within their general police power, as long as the regulation does not conflict with the notion of free trade among the states or serve to isolate the state by virtue of the statute’s economic protection.³⁴ The Illinois Supreme Court has held that a state regulation which affects interstate commerce is permissible where: (1) the statute regulates in a consistent, non-arbitrary manner in order to fulfill a legitimate local public interest; (2) the effects of the statute on interstate commerce are only incidental; and (3) the burden imposed on interstate commerce is clearly not excessive in relation to the local benefit.³⁵

In Lakehead, the court found that the burden on interstate commerce was not excessive (if at all) in weighing the State’s interest in regulating condemnation authority against Lakehead’s potential use of condemnation authority in order to carry out its proposal for supplying greater amounts of petroleum.³⁶ The court held that section 401(b) of the Pipeline Law is not a restriction of any federal regulation, nor does it impair interstate traffic; rather, it is merely a regulation on the use of the State’s sovereign power.³⁷ The Lakehead court concluded that the State is not obligated to issue condemnation authority, and without any federal legislation, the issuance of such authority is discretionary; therefore, absent proof that the requirements of the

³²*Id.*

³³*Id.*(Citing Retail Clerks International Ass’n v. Schermerhorn, 375 U.S. 96, 84 S.Ct. 219 (1963); California v. Thompson, 313 U.S. 109, 61 S.Ct. 930 (1941)).

³⁴*Id.* at *4-5. (Citing Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 100 S.Ct. 2009 (1980); Edward R. Bacon Grain Co. v. City of Chicago, 325 Ill.App. 245, 59 N.E.2d 689 (1945); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S.Ct. 962, (1959); Wyoming v. Oklahoma, 502 U.S. 437, 454, 112 S.Ct. 789, 800 (1992); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497 (1935)).

³⁵*Id.*at *5. (Citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970)).

³⁶*Id.* at *5.

³⁷*Id.* at *5. (Citing Missouri-Kansas-Texas R.R. Co. v. State, 712 P.2d 40 (Sup.Ct.Okl.1985)).

Pipeline Law have been met, the Commission may properly deny an application for certification as well as condemnation authority.³⁸

B. Commission Interpretation of Section 401

Lakehead, along with amici, also argue that the Commission erroneously interpreted section 401(b) of the Pipeline Law by adopting a definition for “public need” which was unsupported by any case authority, and even ignored prior decisions.³⁹ Lakehead claims that this definition created an insurmountable burden for its certification application, resulting in an unfair denial. However, the court examined the intent and history of the legislature, considering the plain and ordinary meaning of the statute’s language within the context of its stated purpose.⁴⁰ Based on this examination, particularly the changes made to the Pipeline Law in 1986 and 1996, the court concluded that the legislature intended to change the law with respect to certifying pipelines by raising the requirements for certification.⁴¹ In addition, the court found that the absence of an express statutory definition of public need indicated the legislative intent to provide the Commission with the flexibility and discretion of defining public need in specific, individual cases.⁴²

Lakehead and amici argue further, however, that the Commission’s approach to reviewing their certification application is

³⁸Lakehead also argued that section 401(b) of the Pipeline Law, as interpreted by the Commission, discriminates against interstate commerce because of the requirement that Lakehead demonstrate a public need for the proposed pipeline. The Lakehead court found that a requirement of proof of a local public need would, in fact violate the Commerce Clause; however, a showing of a local public need is only one way of proving need in accordance with the statute, and the Commission also considered interstate necessity in reviewing Lakehead’s application. Therefore, the court found no constitutional violation in the Commission’s review and subsequent denial of Lakehead’s application. *Id.* at *5. (Citing *St. Louis Connecting R.R. Co. v. Blumberg*, 325 Ill. 387, 394, 156 N.E. 298, 301 (1927); *Kern River Gas Transmission Co. v. Clark County, Nevada*, 757 F.Supp. 1110 (D.Nev.1990)).

³⁹*Id.* at *5.

⁴⁰*Id.* at *5. (Citing *Bruso v. Alexian Brothers Hospital*, 178 Ill.2d 445, 451, 687 N.E.2d 1014, 1016 (1997); *Illinois Bell Telephone Co. v. Illinois Commerce Comm’n*, 282 Ill.App.3d 672, 676, 669 N.E.2d 628,630-31 (1996)).

⁴¹*Id.* at *7. (Citing *Freight Forwarders Institute v. United States*, 409 F.Supp.693 (N.D.Ill.1976); *Ranquist v. Stackler*, 55 Ill.App.3d 545, 370 N.E.2d 1198 (1977)).

⁴²*Id.* at *7. (Citing *Freight Forwarders Institute v. United States*, 409 F.Supp.693 (N.D.Ill.1976); *Ranquist v. Stackler*, 55 Ill.App.3d 545, 370 N.E.2d 1198 (1977)).

erroneous because it fails to make proper considerations when determining if there is a public need for proposed Line 14.⁴³ The court agreed with the reasoning of the Commission, which considered the convenience and necessity of the public as a whole, and not any individuals or number of individuals.⁴⁴ The Commission determined that, in this case, the need of the public is greater than that of a limited number of market players because the definition of a public need cannot be based only on a limited number of private interests.⁴⁵

Lakehead also argued that the Commission erroneously construed the notion of a “need,” claiming that the Commission’s decision ultimately results in a requirement that there be a critical or absolute need for a service; however, the court found that the Commission’s decision describes its rationale which determines whether there is a present need by looking for evidence of a current, or foreseeable future desire or demand by the public.⁴⁶

Finally, Lakehead claims that the Commission’s approach was an arbitrary abandonment of previous precedent.⁴⁷ The court, however, found that while reviewing courts must give Commission decisions significant deference, the Commission is not a judicial body, and its orders are not subject to *res judicata*; therefore, a regulatory body, such as the Illinois Commerce Commission, must have the authority to address each case before it individually, regardless of whether the case involves an issue already decided upon by the Commission.⁴⁸ Consequently, the court found that the Commission’s decision was

⁴³*Id.* at *7.

⁴⁴*Id.* at *7. (Citing *Roy v. Illinois Commerce Comm’n*, 322 Ill.452, 458, 153 N.E. 648, 648 (1926)).

⁴⁵Lakehead argued that the Commission misinterpreted the requirement of public need by excluding business and industrial interests since businesses as well as the industrial arena as a whole are part of the public; however, the court found that in the context of public need, the appropriate inquiry is whether the larger group of the general public requires a service, not whether some individual component(s) of the public could use the service. *Id.* at *9. (Citing *Roy*, 322 Ill. at 458.)

⁴⁶*Id.* at *8.

⁴⁷*Id.* at *8.

⁴⁸*Id.* at *8. (Citing *United Cities Gas Co. v. Illinois Commerce Comm’n*, 163 Ill.2d 1, 12, 643 N.E.2d 719, 725 (1994); *village of Apple River v. Illinois Commerce Comm’n*, 18 Ill.2d 518, 523, 165 N.E.2d 329, 332 (1960); *Archer-Daniels-Midland Co. v. Illinois Commerce Comm’n*, --- Ill.App.3d ---, 687 N.E.2d 1144, 1147 (1997); *Mississippi River Fuel Corp. v. Illinois Commerce Comm’n*, 1 Ill.2d 509, 116 N.E.2d 394 (1953)).

reasonable, and did not constitute an arbitrary abandonment of its prior decisions.⁴⁹

C. Substantial Evidence and Adequate Findings

Lakehead also argued that the Commission's decision was not supported by substantial evidence; however, on appeal, Commission's findings are considered to constitute a true *prima facie* case.⁵⁰ The court stated, based on the fact that the Commission's decision may only be reversed if the appellant clearly demonstrates that its findings are not supported by substantial evidence from an examination of the entire record, that Lakehead failed to demonstrate a public need for its proposed Line 14 as opposed to a private need or expectation; therefore, the court found that the Commission's decision was supported by substantial evidence appearing in the record.⁵¹

Lakehead also argued that the Commission's decision failed to provide adequate findings; however, as the court stated, the Commission is not required to provide findings on each evidentiary issue.⁵² Decisions of the Commission are statutorily sufficient if they enable the court to make an informed and intelligent review of the order.⁵³ The court stated that the Commission thoroughly discussed its findings by frequently citing to the record, by summarizing the arguments and evidence presented, and by clearly articulating its approach to reviewing Lakehead's application.⁵⁴

IV. CONCLUSION

The decision of the Illinois Appellate Court, Third District,

⁴⁹*Id.* at *8.

⁵⁰*Id.* at *9. (Citing 220 ILCS 5/10-201(d) (West 1996); *People exrel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill.2d 348, 592 N.E.2d 1066 (1992)).

⁵¹*Id.* at *9. (Citing 220 ILCS 5/10-201(e)(iv)(A) (West 1996); *Continental Mobile Telephone Co. v. Illinois Commerce Comm'n*, 269 Ill. App.3d 161, 645 N.E.2d 516 (1994)).

⁵²*Id.* at *9. (Citing 220 ILCS 5/10-201(e)(iii) (West 1996); *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill. App.3d 617, 666 N.E.2d 1212 (1996)).

⁵³*Id.* at *9. (Citing 220 ILCS 5/10-201(e)(iii) (West 1996); *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill. App.3d 617, 666 N.E.2d 1212 (1996)).

⁵⁴*Id.* at *10

holding that the Illinois Commerce Commission did not exceed its authority in its interpretation of the Illinois Pipeline Law when it denied Lakehead's application for certification, is significant precedent because the decision clarifies the scope of authority granted to the Illinois Commerce Commission.⁵⁵ The court found that the decision of the Commission was not prohibited by either the state or the federal constitution, and also established guidelines to accompany its holdings that the Commission's decision was supported by substantial evidence as well as adequate findings. The Illinois Appellate Court addressed in this case the authority of an administrative entity to regulate an area closely related to the protection accorded under the Commerce Clause of the United States Constitution, findings that there was no constitutional conflict in the Commission's exercise of its regulatory authority over the potential use of the condemnation authority.⁵⁶ The decision effectively expands the authority of the Commission as an Administrative Law entity over the interstate activities of a utility, and presumably broadens its authority in its general adjudication capacity.

⁵⁵*Id.* at *1.

⁵⁶*Id.* at *1.