

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS  
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ST. PAUL, MINNESOTA 55101**

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
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Commissioner  
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In the Matter of the Application of Xcel  
Energy and ITC Midwest LLC for a  
Certificate of Need for the Huntley-  
Wilmarth 345 kV Transmission Line Project

MPUC Docket No. ET6675/CN-17-184  
OAH Docket No. 82-2500-35157

**REPLY BRIEF OF THE MINNESOTA  
DEPARTMENT OF COMMERCE,  
DIVISION OF ENERGY RESOURCES**

**April 15, 2019**

## INTRODUCTION

The Minnesota Department of Commerce, Division of Energy Resources (DOC DER) respectfully submits this reply brief to the Administrative Law Judge (ALJ) and the Minnesota Public Utilities Commission (Commission) together with substitute proposed findings of fact pertaining to the Application for a Certificate of Need (CN) for the Huntley-Wilmarth 345 kV Transmission Line Project (CN Application), filed by Northern States Power Company, d/b/a Xcel Energy, and ITC Midwest LLC (Applicants). DOC DER concludes that the Applicants satisfied the criteria in parts A and B of Minn. R. 7849.0120. DOC DER submits this reply brief to provide explanations for its substitute proposed findings of fact and clarification regarding limited issues discussed in the Applicants' initial brief.

## ARGUMENT

**I. THE APPLICANTS' INITIAL BRIEF AND PROPOSED FINDINGS OF FACT PROVIDED A BURDEN OF PROOF STANDARD FOR LARGE HIGH-VOLTAGE TRANSMISSION LINE ALTERNATIVES THAT IS NOT SUPPORTED BY THE LANGUAGE OF MINN. R. 7849.0120 B.**

DOC DER agrees with the Applicants that part B of Minn. R. 7849.0120 favors granting a CN because a more reasonable and prudent alternative has not been demonstrated on the record. The Applicants, however, propose a burden of proof standard regarding alternatives under Minn. R. 7849.0120 B that is inconsistent with the language of this rule. For clarity's sake, DOC DER recommends that rather than adopting the Applicants' proposed burden of proof standard regarding alternatives, the ALJ should use the standard stated explicitly in Minn. R. 7849.0120 B.

In their initial brief and proposed findings, the Applicants contended:

The Applicants' burden of proof is met by providing evidence establishing the needs and showing that the proposed project is a reasonable and prudent way to satisfy the articulated needs. The burden

falls on other parties to prove that any alternative they wish to sponsor is (i) sufficiently presented in the record to be considered, and (ii) is more reasonable and prudent than the Applicants' proposal. In making its decision, the ALJ and the Commission "shall consider" only those alternatives for which "there exists substantial evidence on the record with respect to each of the criteria listed in part 7849.0120." This rule requires opponents of the proposed Project to come forward and establish the existence and characteristics of a more reasonable and prudent alternative.<sup>1</sup>

To support this proposed standard, the Applicants cite to *In re Application of the City of Hutchinson (Hutchinson Utilities Commission) for a Certificate of Need to Construct a Large Natural Gas Pipeline*, A03-99, 2003 WL 22234703 (Minn. Ct. App. Sept. 23, 2003), an unpublished Minnesota Court of Appeals case.<sup>2</sup> The rule considered in *City of Hutchinson*, which governs CNs for gas pipelines and storage facilities, is not identical to Minn. R. 7849.0120, which governs CNs for large high-voltage transmission lines (LHVTLs) and large electric generating facilities.

Particularly, the natural gas pipeline rule, Minn. R. 7851.0120, specifically requires that "parties or persons other than the applicant" demonstrate a more reasonable and prudent alternative. The LHVTL rule, on the other hand, only requires that the Commission determine whether "a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record . . . ."<sup>3</sup> While an LHVTL alternative must be still more reasonable and prudent than the proposed facility, the LHVTL rule

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<sup>1</sup> XC Initial Br. at 60 (Mar. 22, 2019) (eDocket No. 20193-151302-02).

<sup>2</sup> See Minn. Stat. § 480A.08, subd. 3 (2018) ("Unpublished opinions of the Court of Appeals are not precedential."). A full and correct copy of the opinion is provided to the ALJ and all other counsel by attachment to this reply brief. *Id.*

<sup>3</sup> Minn. R. 7849.0120 B.

does not require parties or persons other than the applicant to propose the alternative on the record.<sup>4</sup>

The filing requirements regarding possible alternatives in CN applications also varies between CNs for gas pipelines and storage and CNs for large high-voltage transmission lines. For an LHVTL, an applicant must include in each application a “discussion of the availability of alternatives to the facility,” including eight specific alternatives.<sup>5</sup> For a natural gas pipeline or storage facility, on the other hand, an application need only provide “information pertaining to possible alternatives” by providing “a description of the alternative, including its capacity and economic life” and “a cost/benefit analysis, comparing investment costs, annual operating and maintenance costs, environmental effects, safety and reliability aspects, and energy requirements of each alternative with those of the proposed facility.”<sup>6</sup>

To be clear, DOC DER agrees with the Applicants that a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record. DOC DER, however, recommends that the ALJ and Commission adopt the standard as stated in the rule, rather than adopting the Applicants’ proposed standard, which conflates the rule criteria for CNs for LHVTLs with CNs for natural gas pipelines. Therefore, DOC DER proposes several changes to the Applicants’ proposed findings to mirror the requirements of Minn. R. 7849.0120 B.

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<sup>4</sup> Regarding the Applicants’ indication that Minn. R. 7849.0110 provides additional support for their position, that rule provides that alternatives must be put into the record before the public hearing and “for which there exists substantial evidence on the record with respect to each of the criteria listed in part 7849.0120.” Like Minn. R. 7849.0120 B, Minn. R. 7849.0110 does not contemplate that other persons or parties must propose the alternative.

<sup>5</sup> Minn. R. 7849.0260 (2017).

<sup>6</sup> Minn. R. 7851.0290 (2017).

**II. FOR PURPOSES OF SETTING A CAP FOR COSTS IN THIS PROCEEDING, THE COMMISSION SHOULD USE PROJECT COST ESTIMATES BASED ON 2016 DOLLARS.**

DOC DER recommended that the Commission protect Minnesota ratepayers' interests in this proceeding by capping costs to be included in Xcel's Transmission Cost Recovery (TCR) rider for the proposed Project based on the cost estimate determined in this matter.<sup>7</sup> Once the Commission determines the cost of the proposed Project based on its decisions regarding route alternatives, the Commission should hold Xcel accountable by: 1) requiring Xcel to wait until the first rate case after the proposed Project is in service to attempt to recover any cost overruns for Minnesota ratepayers; and 2) requiring Xcel to justify fully the reasonableness of recovering any cost overruns of the proposed Project from Minnesota ratepayers. In its testimony, DOC DER relied on cost estimates in 2016 dollars.<sup>8</sup> DOC DER understands that the Applicants generally agree that this approach is reasonable.<sup>9</sup> In their initial brief, the Applicants stated that "Xcel Energy agrees with the above [DOC DER] clarification recommendations."<sup>10</sup>

In their proposed findings, however, the Applicants escalated their Project cost estimates to the anticipated expenditure years, which is estimated to be 2020 and 2021.<sup>11</sup> The Applicants did not describe the process by which they escalated the cost figures and they merely stated that they accounted for "inflationary pressures."<sup>12</sup> To the extent the Applicants propose to use escalated costs in this proceeding for the purpose of setting a cost cap, DOC DER recommends a different, Commission-approved approach in order to protect ratepayers. TCR rider recovery for projects—including Xcel's—have been capped at a cost estimate escalated by an approved

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<sup>7</sup> DER Initial Br. at 41-49 (Mar. 22, 2019) (eDocket No. 20193-151304-01).

<sup>8</sup> Ex. DER-1 at 4-6 (Johnson Direct); Ex. DER-2 at 2, 9 (Johnson Surrebuttal).

<sup>9</sup> XC Initial Br. at 80-83.

<sup>10</sup> *Id.* at 82.

<sup>11</sup> XC Proposed Findings at 36 (Mar. 22, 2019) (eDocket No. 20193-151302-02); *see also* XC Initial Br. at 12.

<sup>12</sup> *Id.* n.215.

inflation index at the time the Commission approves a project as eligible for rider recovery, based on what is known at that future time about both inflation and the actual in-service date.<sup>13</sup> That is, rather than estimating in a CN proceeding what both future inflation and the actual in-service date may be, a cost cap should be based on the dollars determined in the CN proceeding and then escalated in the future rider proceeding into the appropriate dollars for the particular year a project is determined to be eligible for TCR rider recovery. To ensure use of more accurate inflation and in-service date figures in the future and to avoid confusion, until the Commission determines the eligibility of the Project for TCR rider recovery, the cost cap should be set in this proceeding at an un-escalated amount in 2016 dollars. To that effect, DOC DER has deleted the Applicants' estimated cost figures escalated to the anticipated spend year in the proposed findings and does not recommend that the ALJ adopt them for purposes of setting a cost cap in this proceeding. Rather, for this proceeding, DOC DER recommends setting the cost cap in 2016 dollars.

## CONCLUSION

DOC DER continues to conclude that Applicants satisfied the criteria in parts A and B of Minn. R. 7849.0120.<sup>14</sup> Thus, DOC DER recommends that the ALJ and Commission find that the CN criteria A and B have been met, clarifying the burden of proof under Minn. R. 7849.0120. If the ALJ recommends that the Commission find that the proposed Project is needed, for ratemaking purposes, the ALJ should recommend adoption of the condition to protect ratepayers'

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<sup>13</sup> See, e.g., *In re Xcel Energy's Petition for Approval of 2012 Transmission Cost Recovery (TCR), Project Eligibility, TCR Rate Factors, and 2011 True-up*, MPUC Docket No. E-002/M-12-50, Order Approving 2012 TCR Project Eligibility and Rider, Capping Costs, and Modifying 2011 Tracker Report at 4 (Feb. 7, 2014) (capping the CapX – Bemidji Project cost cap at an escalated amount of \$74 million in 2012 dollars, from \$66.2 million, once determined to be eligible for TCR rider recovery).

<sup>14</sup> DOC DER does not object to a finding that determines the Applicants have met their burden to show need under parts C and D of Minn. R. 7849.0120.

interests by capping costs to be included in Xcel's TCR rider for the proposed Project based on the cost estimate determined in 2016 dollars in this matter and subject to the following:

- the range cost estimates of \$104.8 million to \$160.8 million is the starting point for determining the cap amount;
- Xcel must provide a final number or cap amount within 45 days of the Commission's Order determining the route, reflecting the Commission's decisions in this proceeding using the costs identified for the 39 different route options identified in Schedule 2 of Mr. Stevenson's Direct Testimony and clearly identifying the cost effects of any material changes, due to the Commission's decisions;
- DOC DER and other interested parties will be permitted the opportunity to address whether they agree with the Applicants' final Project cost estimate; and
- the Applicants must identify these costs clearly and ensure that the costs are easily trackable in future recover in riders and rate cases.

Dated: April 15, 2019

Respectfully submitted,

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2003 WL 22234703

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In the Matter of the APPLICATION OF THE CITY OF HUTCHINSON (HUTCHINSON UTILITIES COMMISSION) for a Certificate of Need to Construct a Large Natural Gas Pipeline.

No. A03-99.

Sept. 23, 2003.

Minnesota Public Utilities Commission, CN011826.

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Considered and decided by [PETERSON](#), Presiding Judge, [SCHUMACHER](#), Judge, and [STONEBURNER](#), Judge.

#### UNPUBLISHED OPINION

[PETERSON](#), Judge.

\*1 Hutchinson Utilities Commission (HUC) applied for a certificate of need in order to build a natural-gas pipeline. Relator Northern Natural Gas Company (Northern) intervened in the proceedings before the office of administrative hearings. The administrative law judge reserved for the Minnesota Public Utilities Commission (MPUC) the issue of whether Minnesota law classifies HUC's proposed pipeline as an intrastate pipeline. Nonetheless, relying on a comparative-cost analysis that assumed that the pipeline would not be considered an intrastate pipeline, the ALJ reasoned that Northern had failed to demonstrate that the alternatives it offered more reasonably meet HUC's needs than HUC's proposed pipeline and recommended that the certificate of need be issued. Pursuant to the MPUC's scheduling order, Northern filed exceptions to the ALJ findings, emphasizing that the pipeline's intrastate status is critical because if the intrastate-pipeline statute applies, HUC will lose its eligibility for favorable financing. The MPUC concluded that it did not need to determine whether the proposed pipeline, upon completion, will be an intrastate pipeline and issued an order granting HUC a certificate of need. Northern petitioned for reconsideration, and the MPUC denied the petition.

On appeal, Northern argues that (1) the MPUC erred by refusing to consider the intrastate issue; (2) the MPUC erred by removing the burden of proof from HUC; and (3) HUC failed to provide substantial evidence supporting a determination that its proposed pipeline reasonably meets any identified need of HUC. We affirm.

#### FACTS

The City of Hutchinson is located 55 miles west of Minneapolis and has a population of approximately

13,050 people. Between 1990 and 2000, the number of households in Hutchinson increased by about 18.95%, and growth is projected to continue through at least 2020 due to Hutchinson's close proximity to the Minneapolis area and its role as a manufacturing and retail center for the surrounding rural area.

Respondent Hutchinson Utilities Commission (HUC) provides electricity and natural-gas services to commercial and residential customers in Hutchinson. HUC uses 3.2 billion cubic feet (Bcf) of natural gas per year. Approximately 73% of the gas is used to generate electricity, and HUC's customers directly consume 27%. Since 1960, HUC has obtained its natural gas via Northern's pipeline. HUC's current contract with Northern expires in October 2003.

During winter months, the natural-gas capacity available to HUC under its contract with Northern is 17,253 dekatherms (Dth) per day, with a minimum delivery pressure of 450 pounds per square inch gauge (psig). From 1996 to 2001, HUC's peak winter load was 16,695 Dth per day, which is 97% of capacity. During summer months, the natural-gas capacity available to HUC under its contract with Northern is 14,380 Dth per day, with a minimum delivery pressure of 450 psig. From 1996 to 2001, HUC's peak summer load was 18,291 Dth per day, which is 127% of capacity. As a result, on peak summer days, HUC has had to ask its commercial/industrial customers to reduce their load. It has also had to ask 3M, one of its customers, to reduce its firm commitment on peak days. On days when natural-gas demand exceeds capacity, HUC buys capacity from other sources or, if gas is not available, pays penalties. The Northern market-area zone where Hutchinson is located is capacity constrained and fully subscribed.

**\*2** HUC's demand for natural gas will continue to increase. HUC anticipates adding gas-powered generators to produce electricity in 2011 and 2016.

In September 1996, HUC began seeking additional natural-gas capacity and delivery pressure from Northern, but they were unable to reach agreement. In February 2002, in response to HUC's request for an economic feasibility study for providing 40,000 Dth per day at 800 psig, Northern offered to supply that capacity and pressure provided that HUC pay an initial down payment, annual capacity reservation payments for each contract

year, and maximum demand and commodity surcharges. In April 2002, Northern offered to supply a capacity of 20,000 Dth per day during the winter months and 25,000 Dth per day during the summer months, at a delivery pressure of 600 psig. The April 2002 offer would extend HUC's currently contracted firm-market-area entitlement for eight years, until 2011, and allow HUC to increase its entitlement beginning November 1, 2003 for an initial eight year term. Northern also offered to end the initial term any year between 2007 and 2011. Neither of Northern's proposals provided a detailed explanation of how Northern would meet the additional capacity and pressure requirements. Neither proposal assured additional capacity past 2011.

In December 2001, HUC submitted to the MPUC an application for a certificate of need to construct an 89-mile natural-gas pipeline connecting the Northern Border Pipeline Company pipeline near Trimont, Minnesota, to HUC's facilities in Hutchinson. The proposed pipeline capacity will be 60,000 million cubic feet (Mcf) per day through the initial 34 miles of 16-inch pipe and 40,000 Mcf per day through the remaining 55 miles of 12-inch pipe, with a delivery pressure of 800 psig. That capacity exceeds HUC's forecasted need. The total cost of the proposed pipeline would be at least \$25.5 million (HUC's estimate) but may be as high as \$39 million (Northern's estimate).

In January 2002, the MPUC issued an order accepting HUC's filing as substantially complete upon receipt of (1) an economic feasibility study by Northern regarding the cost of Northern expanding its system to provide more capacity and higher delivery pressure to Hutchinson and (2) a cost comparison by HUC of the Northern and HUC proposals. HUC filed those additional documents in March 2002, and the matter was referred to the Office of Administrative Hearings (OAH) for a contested-case proceeding.

Northern, Reliant Energy Minnegasco (Minnegasco), and respondent Sibley Renville Future Agricultural Interests Recognized, Inc., intervened in the OAH proceeding. Public hearings were held on May 15-16, 2002, and evidentiary hearings were held on June 5, 2002 and on July 22-23, 2002. An administrative law judge (ALJ) issued findings of fact and conclusions of law and recommended that HUC be granted a certificate of need. The ALJ did not determine whether the proposed pipeline was an intrastate pipeline requiring owners to offer available

capacity to any customer on an open access, non-discriminatory basis. In a footnote, the ALJ stated:

\*3 The ALJ makes no findings or conclusions with respect to the status of the proposed pipeline as one subject to "Open Access." The record contains the legal position of [respondent Department of Commerce (DOC) ] and of [Minnegasco] on this point, but the only testimony on the issue was in respect to whether municipal bond financing could be used if the pipeline is not restricted to municipal users. At the close of the hearing, the [DOC] and HUC requested that this issue be addressed to the [MPUC] after a ruling on the Certificate of Need.

Northern filed exceptions to the ALJ's recommendation, arguing that HUC failed to show the need for the proposed pipeline and that the proposed pipeline was governed by [Minn.Stat. § 216B.045 \(2002\)](#). The MPUC adopted the ALJ's findings of fact, conclusions of law, and recommendation and issued an order granting HUC the certificate of need. The MPUC denied Northern's petition for reconsideration. This certiorari appeal from the order denying Northern's petition for reconsideration followed.

### DECISION

A reviewing court may reverse or modify an agency decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or

(e) Unsupported by substantial evidence in view of the entire record as submitted; or

(f) Arbitrary or capricious.

[Minn.Stat. § 14.69 \(2002\)](#). When reviewing an agency decision, the court must ... recognize the need for exercising judicial restraint and for restricting judicial functions to a narrow area of responsibility lest (the court) substitute its judgment for that of the agency. It must be guided in its review by the principle that the agency's conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated.

....

When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience. The agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, and judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing. We defer to an agency's conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony.

[In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota](#), 624 N.W.2d 264, 277-78 (Minn.2001) (citations and quotations omitted). On appeal from an agency decision, the party seeking review bears the burden of proving that the agency's conclusions violate one or more provisions of [Minn.Stat. § 14.69 \(2002\)](#). [Markwardt v. State, Water Resources Bd.](#), 254 N.W.2d 371, 374 (Minn.1977) (applying burden of proof to predecessor statute).

I.

\*4 Northern argues that because the pipeline for which HUC sought a certificate of need is an intrastate pipeline, the MPUC erred when it refused to consider the application of [Minn.Stat. § 216B.045 \(2002\)](#) to the proposed pipeline. Northern also argues that application of [Minn.Stat. § 216B.045](#) invalidates the comparative-cost analysis relied on by the ALJ and the MPUC in determining that Northern failed to demonstrate that its alternative proposals meet HUC's needs more reasonably and prudently than the proposed pipeline.

In making its first argument, Northern mischaracterizes the MPUC's decision. The MPUC did not refuse to consider the application of [Minn.Stat. § 216B.045](#) to the proposed pipeline. In the opening paragraph of its findings and conclusions the MPUC stated, "The Commission need not and will not reach the issue of whether the proposed pipeline, upon completion, would be subject to Commission regulation under [Minn.Stat. § 216B.045](#). The only issue considered herein is whether the certificate of need should be granted." This statement demonstrates that the MPUC considered whether [Minn.Stat. § 216B.045](#) applies to the proposed pipeline and concluded that it was not necessary to determine whether the statute applies before deciding whether to grant a certificate of need for the pipeline.

Northern's second argument essentially disputes the MPUC's conclusion that it was not necessary to determine whether [Minn.Stat. § 216B.045](#) applies to the proposed pipeline before deciding whether to grant a certificate of need for the pipeline. Northern contends that because [Minn.Stat. § 216B.045](#) applies to the proposed pipeline, the MPUC had to consider the impact of [Minn.Stat. § 216B.045](#) when deciding whether to grant HUC a certificate of need.

To understand Northern's argument, it is necessary to understand the certificate-of-need process. Under [Minn.Stat. § 216B.243, subd. 2 \(2002\)](#), "[n]o large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the [MPUC]." <sup>1</sup> The statute further provides that

<sup>1</sup> The parties do not dispute that the proposed pipeline is a "large energy facility" as defined under [Minn.Stat. § 216B.2421 \(2002\)](#).

[n]o proposed large energy facility shall be certified for construction unless the applicant can show that demand

for electricity cannot be met more cost effectively through energy conservation and load-management measures and unless the applicant has otherwise justified its need. In assessing need, the commission shall evaluate:

(1) the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based;

(2) the effect of existing or possible energy conservation programs under sections 216C.05 to 216C.30 and this section or other federal or state legislation on long-term energy demand;

(3) the relationship of the proposed facility to overall state energy needs, as described in the most recent state energy policy and conservation report prepared under section 216C.18;

(4) promotional activities that may have given rise to the demand for this facility;

\*5 (5) benefits of this facility, including its uses to protect or enhance environmental quality, and to increase reliability of energy supply in Minnesota and the region;

(6) possible alternatives for satisfying the energy demand or transmission needs including but not limited to potential for increased efficiency and upgrading of existing energy generation and transmission facilities, load-management programs, and distributed generation;

(7) the policies, rules, and regulations of other state and federal agencies and local governments; and

(8) any feasible combination of energy conservation improvements, required under section 216B.241, that can (i) replace part or all of the energy to be provided by the proposed facility, and (ii) compete with it economically.

[Minn.Stat. § 216B.243, subd. 3 \(2002\)](#). In addition to these statutory factors for assessing need, [Minn.Stat. § 216B.243, subd. 1 \(2002\)](#), directs the MPUC to "adopt assessment of need criteria to be used in the determination of need for large energy facilities." The criteria adopted by the MPUC state, in part, that a certificate of need shall be granted if it is determined that 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.

[Minn. R. 7855.0120, subp. B \(2001\).](#)

[Minn.Stat. § 216B.045](#) states in relevant part:

**Subdivision 1. Definition of intrastate pipeline.** For the purposes of this section “intrastate pipeline” means a pipeline wholly within the state of Minnesota which transports or delivers natural gas received from another person at a point inside or at the border of the state, which is delivered at a point within the state to another, provided that all the natural gas is consumed within the state. An intrastate pipeline does not include a pipeline owned or operated by a public utility, unless a public utility files a petition requesting that a pipeline or a portion of a pipeline be classified as an intrastate pipeline and the commission approves the petition.

**Subd. 2. Reasonable rate.** Every rate and contract relating to the sale or transportation of natural gas through an intrastate pipeline shall be just and reasonable. No owner or operator of an intrastate pipeline shall provide intrastate pipeline services in a manner which unreasonably discriminates among customers receiving like or contemporaneous services.

**\*6 Subd. 3. Transportation rates; discrimination.** Every owner or operator of an intrastate pipeline shall offer intrastate pipeline transportation services by contract on an open access, nondiscriminatory basis. To the extent the intrastate pipeline has available capacity, the owner or operator of the intrastate pipeline must provide firm and interruptible transportation on behalf of any customer.

If physical facilities are needed to establish service to a customer, the customer may provide those facilities or the owner or operator of the intrastate pipeline may provide the facilities for a reasonable and compensatory charge.

**Subd. 4. Contracts; commission approval.** No contract establishing the rates, terms, and conditions of service and facilities to be provided by intrastate pipelines is effective until it is filed with and approved by the commission. The commission has the authority to approve the contracts and to regulate the types and quality of services to be provided through intrastate pipelines. The approval of a contract for an intrastate pipeline to provide service to a public utility does not constitute a determination by the commission that the prices actually paid by the public utility under that contract are reasonable or prudent nor does approval constitute a determination that purchases of gas made or deliveries of gas taken by the public utility under that contract are reasonable or prudent.

[Minn.Stat. § 216B.045, subds. 1-4.](#) The statute regulates the operation of intrastate pipelines by requiring intrastate-pipeline owners to offer available pipeline capacity to any customer on an open-access, nondiscriminatory basis. Northern argues that because the proposed pipeline is an intrastate pipeline and HUC will have capacity available on the pipeline, the MPUC erred when it decided to grant HUC a certificate of need without considering the impact that offering the available capacity to customers will have on the operation of the pipeline. Specifically, Northern argues that if HUC provides services to a non-municipal customer, the interest rate that HUC will have to pay to finance the pipeline will increase, and the higher interest rate invalidates the MPUC's comparison between the cost of the proposed pipeline and the cost of alternatives.

Although Northern argues convincingly that the manner in which the proposed pipeline will be operated will affect the cost of the pipeline, which, in turn, should affect the MPUC's cost comparison, we are not persuaded that the MPUC's determination that it did not need to decide whether HUC's pipeline will be subject to regulation under [Minn.Stat. § 216B.045](#) is an error of law. The MPUC did not conclude that a more reasonable and prudent alternative to the proposed pipeline had not been demonstrated solely because of the cost-comparison figures. The MPUC also concluded that each of Northern's alternative proposals failed to address



HUC's long-term needs. The MPUC found that the February 22, 2002, proposal

\*7 was not specific regarding meeting anticipated demands after 2011.... The ALJ indicated that he was persuaded that the February 22, 2002 offer was not a more reasonable and prudent alternative to the proposed pipeline because of the February 22, 2002 offer's cost and its failure to address the longer term needs.

The MPUC found that the April 24, 2002, proposal

did not provide assurance of additional supplies past 2011, when HUC anticipates placing an additional gas fired generator online....The ALJ indicated that because this proposal failed to address the likely need for increased capacity beginning in 2011, he was persuaded that this was not a more reasonable or prudent alternative.

Even if we were to assume that the proposed pipeline is an intrastate pipeline subject to [Minn.Stat. § 216B.045](#), there is substantial evidence in the record to support the MPUC's determination that the alternatives are not reasonable and prudent alternatives to the proposed pipeline because the alternatives Northern proposed do not address anticipated increases in demand after 2011. Therefore, we conclude that the MPUC did not err when it determined that it did not need to determine whether the proposed pipeline is an intrastate pipeline under [Minn.Stat. § 216B.045](#).

## II.

Northern argues that because [Minn. R. 7851.0120, subp. B](#), places the burden of proving the existence of a more reasonable and prudent alternative on a party other

than the applicant, the rule conflicts with [Minn.Stat. § 216B.243](#), which places the burden of proving the need for the proposed facility on the applicant. Northern contends that the statute places the burden of proof on the applicant, and a rule cannot change the burden.

We do not agree that [Minn. R. 7851.0120, subp. B](#), changes an applicant's burden of proof. Under the certificate-of-need process established by statute and rule, an applicant bears the burden of proving the need for a proposed facility. An applicant fails to meet this burden when another party demonstrates that there is a more reasonable and prudent alternative to the facility proposed by the applicant. [Minn.Stat. § 216B.243, subd. 3](#); [Minn. R. 7851.0120, subp. 8](#). This regulatory scheme is simply a practical way to prevent the issuance of a certificate of need when there is a more reasonable and prudent alternative to the proposed facility without requiring an applicant to face the extraordinary difficulty of proving that there is not a more reasonable and prudent alternative. See *State v. Paige*, 256 N.W.2d 298, 304 (Minn.1977) (recognizing difficulty in "proving a negative").

## III.

Substantial evidence is defined as: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety. *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 668 (Minn.1984). "If an administrative agency engages in reasoned decisionmaking, [we] will affirm, even though [we] may have reached a different conclusion had [we] been the fact-finder." *Id.* at 669.

\*8 The evidence establishes that Northern has no additional capacity available on the branch line serving HUC. During the 1996-2001, HUC's peak winter load reached 97% of contracted-for capacity, and its peak summer load reached 127% of contracted-for capacity. HUC presented evidence that its demand for natural gas will continue to increase through 2016. Northern and the DOC presented evidence questioning the validity of HUC's estimates of its future need for natural gas. But "[i]t is within the peculiar expertise of the agency to evaluate

the weight [and credibility] to be accorded expert evidence, [so this court] will not substitute [its] judgment for that of the agency.” *In re Hutchinson*, 440 N.W.2d 171, 177 (Minn.App.1989), review denied (Minn. Aug. 9, 1989).

Northern argues that it showed the existence of a more reasonable and prudent alternative to the proposed pipeline. But, as we have already stated, the MPUC determined that Northern failed to prove the existence of a more reasonable and prudent alternative because Northern failed to show that its alternatives could meet HUC's capacity and pressure requirements or provide additional services beyond 2011. Northern also cites the environmental costs of constructing a new pipeline, but it

does not cite evidence showing that it could meet HUC's requirements without constructing an additional facility.

We conclude that the MPUC's order granting HUC a certificate of need is supported by substantial evidence and that there is a rational connection between the facts found by the MPUC and the decision to grant HUC a certificate of need.

**Affirmed.**

#### **All Citations**

Not Reported in N.W.2d, 2003 WL 22234703

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