IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA

* * * *

Gerald Pesall, Appellant

v.

Montana Dakota Utilities, Otter Tail Power, Schuring Farms Inc., Bradley Morehouse, and the South Dakota Public Utilities Commission, Appellees

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APPEAL FROM THE PUBLIC UTILITIES COMMISSION IN DOCKET NUMBER EL13-28
PIERRE, SOUTH DAKOTA.

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CIV14-53

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APPELLANT'S BRIEF

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The Notice of Appeal was filed on the 15th day of September, 2014

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PRELIMINARY STATEMENT

Gerald Pesall is appealing a Decision and Order issued by the South Dakota Public Utilities Commission. That Decision and Order granted a permit for the construction of a 345kV transmission line between Ellendale, North Dakota and Big Stone, South Dakota. Copies of the Decision and Order, and Project Overview map are included in the attached Appendix. This brief is being submitted to the Court pursuant to S.D.C.L. 1-26-33.2 et seq, In this brief, references to the evidentiary hearing transcript will be designated "TR" followed by the appropriate page number. References to exhibits will be designated by exhibit number and page. References to other materials will be by name and page number where appropriate.

JURISDICTIONAL STATEMENT

Montana Dakota Utilities and Otter Tail Power (Applicants) applied for a permit to construct a high-voltage transmission line with the South Dakota Public Utilities Commission (Commission) on August 23, 2013. Gerald Pesall was granted party status to those proceedings on November 6, 2013. Schuring Farms, Inc., Bradley Morehouse, and others were granted party status on May 1, 2014. The Commission issued its Final Decision and Order granting the permit on August 22, 2014. Gerald Pesall brings this appeal pursuant to S.D.C.L. 49-1-19 and 1-26-30. Notice of Appeal was timely filed on September 15, 2014.

STATEMENT OF THE ISSUES

Gerald Pesall appeals the Commission's Decision and Order with respect to the following issues:

1. Whether the Commission issued findings of fact which were clearly erroneous and not supported by the evidence presented, specifically:
   a) The public need and public benefit of the project set out in findings of fact number 14 through 21 and 23.

      The Commission generally found that public need existed and that public benefit in South Dakota would result from the Project.

   b) The impacts of the project and the adequacy of the Applicants' proposed mitigation efforts, as set out in findings of fact number 28 through 30.

      The Commission generally found that the Applicants had developed reasonable mitigation plans for the environmental, social and economic harms likely to result from construction of the project.

   c) Gerald Pesall's objections to the project, including the impact on property values, the impact

on farming activities, and the spread of Soybean Cyst Nematode (SCN), as set out in findings of fact number 33 through 57.

The Commission generally found that, due to the Applicants' proposed mitigation activities and the conditions of the permit, the Project would not pose a threat of serious injury to the environment, or to the social and economic condition of the inhabitants of the siting area, through its impact on property values, farming activities, and the spread of SCN.

d) The Applicants' satisfaction of of Requirements for the Issuance of the Transmission Facility Permit, as set out in findings of fact number 71 through 81.

The Commission generally found that the Applicants had met the legal requirements for their application, satisfied their burden of proof with respect to the elements of S.D.C.L. Chapter 49-41B, and that the conditions of the permit would be sufficient to ensure that significant issues would not arise.

2. Whether the Public Utilities Commission improperly admitted the MISO Studies into evidence, as set out in its conclusion of law number 14.

The Commission admitted the MISO studies included in Exhibit 4 and Appendices B.1 to B.4 of the Application into evidence without further foundation, over Pesall's objection, pursuant to S.D.C.L. 1-26-19(1) as materials "not reasonably susceptible to proof" under the rules of evidence.

3. Whether the Public Utilities Commission improperly applied the Applicants' burden of proof under S.D.C.L. 49-41B-22, as set out in its conclusions of law numbers 15 and 16.

The Commission concluded that the Applicants had proven all of the elements of S.D.C.L. 49-41B-22, by a preponderance of the evidence, that a permit should be granted, and that Pesall's objections did not warrant a denial of the Application.

4. Whether the Public Utilities Commission improperly placed a burden of proof upon the Intervenors as set out in its conclusion of law number 18.

   The Commission held that the Intervenors had a burden of presenting sufficient evidence to support a denial of the permit, and had not done so.

5. Whether the Public Utilities Commission improperly delegated its authority, as prohibited by S.D.C.L. 49-1-17 when it ordered the Applicants to submit soybean cyst nematode (SCN) mitigation plans after the permit was issued.

   The Commission, in issuing the permit, ordered the Applicants themselves to conduct additional testing, and then draft their own mitigation plan to minimize the risk of spreading SCN, after the permit was issued.

6. Whether the Public Utilities Commission improperly exceeded the twelve month limitation established by S.D.C.L. 49-41B-24 when it ordered the Applicants to comply with a SCN mitigation plan which would not be drafted until after the permit was issued.

   The Commission, in issuing the permit, ordered the Applicants to comply with SCN mitigation plans which had not been prepared when the permit was issued, and would not be drafted until after the twelve month deadline had lapsed.

STATEMENT OF THE CASE

Montana Dakota Utilities and Otter Tail Power (Applicants) filed an application for a permit to construct a high-voltage transmission line on August 23, 2013. The Commission granted Gerald Pesall party status in that proceeding on November 6, 2013. Schuring Farms, Inc. and Bradley More house were granted party status on May 1, 2014.

Pursuant to the Commission's Procedural and Scheduling order, the parties conducted discovery and submitted pre-filed testimony and exhibits. The Commission conducted an evidentiary hearing on June 10 and 11, 2014. At that hearing, all of the parties' pre-filed testimony and exhibits were admitted into evidence by stipulation, except for a series of studies which Applicants obtained from the Midcontinent Independent Service Operator (MISO)[1]. MISO was not a party to this proceeding, and no representatives of MISO appeared to testify. The studies themselves discuss seventeen different electrical development projects proposed by MISO, only one of which is at issue in this case.

Gerald Pesall objected to the admission of the MISO Studies. (TR, pp. 107, 109.) The Commission overruled Pesall's objection and admitted the MISO studies. (TR, pp. 109-110.)

At the evidentiary hearing, the Applicants presented live testimony from Project Director Henry Ford, Engineer Jason Weiers, Biologist Angela Piner, Engineer Danny Frederick, and Engineer Jon Leman. Intervenor Gerald Pesall presented live testimony from Dr. Gregory Tylka, and himself. Intervenors Randall Schuring and Bradley Morehouse testified for themselves.

In addition to the evidence, the Applicants and Commission Staff submitted proposed settlement stipulation(s). (Exhibit 301 and 301A.) These stipulations included a series of conditions to be placed on the permit, should it be granted. The Intervenors were not party to these stipulations.

1 MISO is a regional transmission organization which is intended to provide "regional grid management and open access to the transmission facilities." See gen. http://www.misoenergy.org.

The parties submitted briefs following the evidentiary hearing, and presented oral arguments at hearings on August 6 and August 13, 2014. On August 13, 2014 the Commission voted to grant the permit subject to the conditions in the Amended Stipulation, and added a requirement that the Applicants draft additional mitigation plans after the permit was in place. The Commission's Final Decision and Order was entered on August 22, 2014.

STATEMENT OF THE FACTS

Much of the testimony at the evidentiary hearing was uncontested. Conflicting evidence was presented on several issues, however. For clarity, the following factual summary is sub-divided into facts which were uncontested, and those for which conflicting evidence was presented.

1. Uncontested Facts

The Applicants wish to construct a 345kV transmission line which would start near Ellendale, North Dakota, run through Brown, Day, and Grant counties in South Dakota, and terminate near Big Stone City, South Dakota. (Exhibit 1, p. 11.)

At Big Stone City, this line would connect to a second 345kV line which would run to a substation near Brookings, South Dakota. From there, it would connect to a third 345kV line which would terminate near Minneapolis, Minnesota. (Exhibit 1, Appendix B1, p. 1-2.)

The idea to construct at 345kV line between Ellendale and Big Stone City originated through a series of studies prepared by MISO. These MISO studies did not select the route proposed in the Application. (TR, p. 43.)

The general flow of power for this line would be from generation facilities in North Dakota to load centers in Minnesota. (TR, pp. 116-117; Exhibit 1, Appendix B4 p. 106.) In South Dakota, no wind energy or other generating facilities will interconnect with the proposed line. (TR, pp. 42-43.)

Apart from the substations on either end, the Applicants do not anticipate any interconnections at all. (TR, p. 43.) Applicants were not able to identify specific customers in South Dakota who would benefit from the construction of the project. (Exhibit 4, p. 4.)

Physically, the project would consist of a set of high-voltage electrical lines suspended from steel monopole towers. Individual contractors with large construction and drilling equipment would be used to erect these towers. Each tower would be about 125 feet tall, and rest on a cylindrical concrete foundation roughly six feet in diameter and 25 to 30 feet deep. Construction would require the removal and disposal of around 30 cubic yards of soil per tower. (Exhibit 1, pp. 89-90; TR, pp. 174-177.)

Although they did not directly intervene, all of the governing bodies who expressed a position in writing on the proposed line opposed it. (TR, p. 42.) Specific issues raised by the Intervenors in this case included environmental hazards, the transmission of the soybean cyst nematode, interference with farming operations, and property devaluation.

With respect to the environmental hazards of the project, the most significant one appears to be the spread of soybean cyst nematode (SCN) in the region. SCN is a tiny soil-born parasite which can cause soybean productivity losses of up to 50% in infected fields. Once SCN is present in a field, it cannot generally be removed or eliminated. It can be spread by farming activities, wildlife, or even wind. However, construction and earth-moving activities like those necessary to build the proposed line pose a greater risk of spreading the parasite from field-to-field and farm-to-farm. (TR, pp. 229-233; Exhibit 102.)

SCN was first identified in Union County, South Dakota in 1997. (Exhibit 108.) Since then it has spread from county-to-county over time. (Exhibit 109, p. 1.) SCN has been a known problem in Grant and Day counties for many years. (Id.)

Soybeans are one of the major crops produced in the area where the line would be built. (Exhibit 101, p. 2.) The area itself has been primarily developed for agricultural production. Gerald Pesall is one of many farmers who inhabit the siting area and who continue to operate multi-generational family farms. His own has been in continuous operation for over 125 years. (TR, 279, 280; Exhibit 101, p 1.) Pesall's objections to the proposed line relate to safety issues, liability issues, damage to otherwise productive land, and decreased property values. (Exhibit 101, p.2.)

With respect to to the property value and economic impacts of the project, the Applicants were aware of their obligation to provide economic impact information as part of the application process, but did not examine the economic impact the project would have on the actual farms in the siting area. (TR, pp. 157-158.) Applicants testified that property value studies were conducted by KLJ, one of their consulting firms, (TR, pp. 41, 156-157.) These studies, however, do not appear to have been offered into evidence, and no representatives from KLJ appeared to testify.

With respect to interference with farming operations, the construction and maintenance of the project would inevitably result in crop damage, because construction and maintenance equipment would have to move through otherwise productive fields from time-to-time. As a remedy for this, Applicants proposed to pay producers reasonable compensation for these crop damages. (Exhibit 301A, p. 7.)

Applicants' compensation proposal did not account for the reduction in average crop yields that construction and maintenance would cause, or the impact this would have on producers' crop insurance coverage. (TR, p. 41.) Area farmers typically insure their crops against loss due to weather and other risks. In the event of a claim, their compensation is based on a multi-year average productivity the insured field. Crop damage from construction and maintenance of the proposed line would reduce that

average yield, causing the farmer to get a reduced insurance payment if he makes a crop insurance claim in a later year. (TR pp. 282-284; Exhibit 111.)

2. Contested Facts

The material presented at the evidentiary hearing included conflicting evidence on three significant points: (1) The spread of SCN, (2) The proposed line's impact area on farms, and (3) The proposed line's impact on property values.

a) Evidence Regarding SCN

The first significant question for which conflicting evidence was presented was whether construction and maintenance of the proposed line posed a risk of environmental harm by accelerating the spread of SCN.

The Applicants originally claimed "the construction of the project will have no impact on the field-to-field transmission of soil and plant borne pests." (Exhibit 5, p. 6.) At the evidentiary hearing Henry Ford further testified that, "When this issue was raised by Mr. Pesall's attorney this was not an issue that the owners of this project or the Applicants here were really aware of." (TR, p. 33.) However Ms. Piner, one of the Applicants consultants, later testified that she had encountered the SCN issue in a prior project in Wisconsin. (TR, p.161.)

Testimony from Dr. Gregory Tylka, however, made it clear that SCN transmission can significantly harm soybean production. It has been a known problem in South Dakota since 1997, and that construction activities like those required to construct and maintain the proposed line are likely to spread SCN more rapidly than ordinary farming activities. (Exhibit 102, pp. 2-3.)

Dr. Tylka's exhibits also demonstrated that the SCN problem in South Dakota is geographically limited to the route selected by the Applicants. SCN has been a known problem in Grant and Day

county since the late 1990's, but spread to Roberts, Marshall, and Brown counties more recently. (Exhibit 109, p. 1.) Thus, South Dakota has a unique opportunity to manage the spread of SCN. (TR, p. 232.)

Dr. Tylka's was the only person to testify with any expertise on SCN. On that subject, he is a nationally recognized expert, and his testimony was supported by extensive education, experience, and training. (Exhibit 102 and 103.)

b) Interference with Farms

The second significant question on which conflicting evidence was presented is the extent to which construction and operation of the proposed line would interfere with, or harm, existing farming operations in the siting area.

In prefiled testimony, Mr. Ford and Ms. Piner opined that the proposed line would not pose a threat of serious injury to the environment and economic conditions of the inhabitants of the siting area, that it would not impair the health, safety, and welfare of the inhabitants, and that it would not unduly interfere with the orderly development of the region. (Exhibit 16A, pp. 21-22; Exhibit 18, pp. 9-10.) On cross examination, however, Ford admitted that no social or economic studies had actually been conducted on the impact the proposed line would have on local farms. (TR, pp. 49-50.) Neither Mr. Ford nor Ms. Piner are farmers themselves, they do not have formal education in sociology or economics, and they do not reside in the siting area. (TR, pp. 38-39 and 159-160.)

Through further testimony from Mr. Ford and Mr. Weiers, some of the risks which the proposed line would create for area farms were admitted. These include the danger of refueling equipment within 100 feet of the line, (TR, p. 57,) potential shocks from stray voltage or induced current, (TR, pp. 195-196,) and the risk of collisions between towers, lines, and agricultural equipment, (TR, p. 50-51.)

Gerald Pesall, a farmer in the siting area, provided ample testimony regarding the potential for (1) Increased landowner risk and liability due to the potential for collisions between farm equipment and the towers or wires, (2) Reduced ability to conduct aerial spraying, (3) Increased risk of injury and decreased productivity due to limitations of working around lines and towers, (4) Lack of a mechanism to address harm to average field production levels for crop insurance purposes. (5) Increased overhead, paperwork, and lost time due to the activities which would be required to accommodate the line. (Exhibit 101, p. 2-3. TR, pp. 282-284; Exhibit 111.) Randall Schuring, another farmer in the siting area, also testified that these problems would arise if the line were constructed. (TR, pp. 314-317.)

c) Property Values

The third significant question for which conflicting evidence was presented is whether the proposed line would negatively impact land values for property under or adjacent to the proposed line.

Initially the Applicants claimed that the proposed line will not "have significant short- or long-term effects on … land values … due to the relatively minimal footprint of the Project." (Exhibit 1, p.72; Exhibit 4, pp. 2-3.) During cross-examination Mr. Ford restated that claim, and further asserted that a property value study had been conducted by KLJ, which was referenced in pre-filed testimony. (TR, p. 41.) However, Mr. Ford's pre-filed testimony does not appear to address either the property value study Mr. Ford described, nor does it provide any other credible assessment of the impact the proposed line would have on nearby land values.

By contrast, Mr. Pesall testified that it would in fact lower his land values. (Exhibit 101, p. 2.) Mr. Schuring also testified that land values would be lower for property burdened by the proposed line. (TR, pp, 325-326.)

ARGUMENT

S.D.C.L. Chapter 49-41B governs the application process for transmission line permits, and S.D.C.L. 49-41B-22 places the burden of proof on the applicant to show the following before a permit can be issued:

> "The applicant has the burden of proof to establish that:
> (1) The proposed facility will comply with all applicable laws and rules;
> (2) The facility will not pose a threat of serious injury to the environment nor the social and economic condition of the inhabitants or expected inhabitants of the siting area;
> (3) The facility will not substantially impair the health, safety, or welfare of the inhabitants; and
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government."

S.D.C.L. 1-26-36 governs Circuit Court review of administrative agency decisions on appeal, including appeals from the Public Utilities Commission. It provides:

> "The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17."

This appeal includes both factual and legal errors by the Commission. For factual questions, "[a] decision is clearly erroneous if, after reviewing the entire record, the reviewing court is left with a

definite and firm conviction that a mistake has been made." *Steinmetz v. State, DOC Star Academy*, 2008 SD 87, ¶6, 756 N.W.2d 392. Legal questions, and mixed questions of law and fact are reviewed de-novo. *Id*.

In this brief, the erroneous findings of fact on which Gerald Pesall seeks review are set out in section 1. Issues of law or mixed questions of law and fact are set out in sections 2 through 6.

1. The Commission Issued Clearly Erroneous Findings of Fact

The Commission issued 82 separate findings of fact. Among these, four separate portions are clearly erroneous and not supported by the evidence, or are actually legal conclusions. These include: (a) Findings 14 and 21-23 on public need and public benefit from the project in South Dakota, (b) Findings 28 -30 on the reasonableness of Applicants' proposed mitigation plans, (c) Findings 35-57 on Gerald Pesall's objections regarding the impact on property values, farming activities, and the spread of SCN, and (d) Findings 71-81 which relate to the Applicants satisfying their burden of proof.

While the Court is required to give weight to agency findings, when the Commission makes findings of fact that are "clearly erroneous in light of the entire evidence in the record," this Court can overturn them, reverse the decision, or remand the matter further proceedings. S.D.C.L. 1-26-36.

a) Public need and Public Benefit in South Dakota: Findings 14, 21-23.

In finding number 14, the Commission states that the project "will be used by area utilities to transport electric supply to and from lower voltage transmission and distribution lines for delivery to retail customers," The Commission cites testimony from Jason Weiers, TR pp. 105-107, and Exhibit 1, §6 as the basis for these finding. Both of these rely on the MISO studies, the inadmissibility of which is addressed in section 2, below.

Even if the MISO studies were admissible, neither Mr. Weiers' testimony, nor Exhibit 1, §6, nor

the MISO studies actually state this. There is no testimony in the record from any purported "area utilities" which indicate this is the case. Applicants presented no evidence of any actual customers in South Dakota who would receive electricity from the proposed line, and acknowledged that they could not do so.

Finding number 14 goes on to state that the project "will facilitate development of future wind generation projects within eastern South Dakota." For this point the Commission cites testimony from Mr. Weiers at TR, p. 139. Mr. Weiers stated that "I think generally if you would draw a square between Ellendale and Big Stone South and encompass northeastern South Dakota, I think generally that would be the immediate area of benefit for future wind interconnections." But this general idea is contradicted by the overwhelming weight of the evidence.

The MISO studies on which Weiers relied for his testimony state that the intended use for the line is to transmit wind energy from North Dakota. "A new planned line from North Dakota into Minnesota provides an outlet to North Dakota wind by directly transferring wind energy at 345kV, thus offloading the existing 230kV circuits." (Exhibit 1, Appendix B4, p. 106.) Henry Ford, the Project Director, acknowledged that there are no existing or anticipated wind energy projects in South Dakota which would connect to the proposed line. (TR pp. 42-43.)

In findings number 21-23, the Commission states that the project will generate several million dollars in tax revenue, and that this equates to public benefit. In making these findings, the Commission adopts the tax revenue projections provided by the Applicants in Ex. 2, Response to Data Request 1-5. The Commission fails, however, to offset those tax projections with the economic burden that the project would produce in the form of reduced farm productivity, reduced property values, and reduced property taxes.

There is ample evidence in the record that existing farm productivity would be harmed both by the physical presence of the towers, and by SCN transmission or other environmental damage. Adjoining property values, and the taxes based upon them, would also be depressed in the siting area. Before public benefit can be quantified, these negative factors must be weighed against the purported tax revenue gains. The Court should determine findings 14 and 21-23 to be clearly erroneous because the Commission fails to do this.

b) Applicants' Mitigation Plans: Findings 28-30.

In finding number 28 the Commission states "the Applicants have developed reasonable mitigation plans to mitigate any environmental concerns arising from the construction or operation of the Project." This sentence conflicts with the rest of finding 28, and with the Commission's own permit conditions, which require the Applicants to develop additional new mitigation plans, particularly for SCN, at some point after the permit is in place.

In findings number 29 and 30 the Commission states "no evidence was introduced to demonstrate any effect of the Project on property values," and that the Applicants' "efforts are sufficient to prevent the project from posing a serious injury to the social and economic condition of the expected inhabitants of the Project area." These findings are contradicted by the record and the Order. Mr. Pesall testified that it would in fact lower his land values. (Exhibit 101, p. 2.) Mr. Schuring also testified that land values would be lower for property burdened by the proposed line. (TR pp. 325-326.) And, the Order itself requires new mitigation efforts in addition to those already offered by the Applicants.

The Court should determine findings 28-30 to be clearly erroneous because they are internally inconsistent and contradict the record.

c) Gerald Pesall's Objections Regarding the Impact on Property Values, Farming Activities, and the Spread of SCN: Findings 35-57.

In findings number 35-57 the Commission addresses the specific objections and factual concerns raised by Gerald Pesall. In finding number 36, the Commission states that the "Project's placement of the route on Pesall's property will not materially impede Pesall's farming practices because of the open spaces and Pesall's ability to farm around the two structures on his property." The Commission cites Exhibits 21A and 21B in support of this finding.

Exhibits 21A and 21B are photographs of property which belongs to Gerald Pesall, and which the line would cross. They contain no information about Gerald Pesall, or his farming practices. Gerald Pesall's testimony was that the presence of the line *would* materially interfere with his farming practices. Apart naked assertions by Mr. Ford and Ms. Piner, there is no testimony in the record to contradict him on that point, and thus no actual evidence to support this finding of fact.

In finding number 37 the Commission states "Pesall's objection is less an objection to the issuance of the Permit than an objection to the placement of the transmission line on his property. Pesall admitted that if the Project would simply move the line off his property, then he would 'go away and disappear.'" It is improper for the Commission to attempt to rewrite Gerald Pesall's legal objection(s), whatever his motivations may be, because S.D.C.L. 1-26-18 guarantee's Pesall the right to make his own legal arguments.

In finding number 39 the Commission states, "If Pesall already has SCN, then there is no risk of spreading SCN to Pesall's property through construction." This finding is contradicted by the record. Dr. Tylka's testimony and supporting exhibits demonstrated that construction activities can cause SCN

to be transmitted to different locations within a single field. On its own, SCN can only move about an inch. (TR, p. 244.)

In finding number 40, the Commission states "There is no evidence indicating whether any of the landowners over whose land the transmission line will travel do or do not already have SCN. Pesall's Expert, Dr. Tylka, testified that SCN is present in Brown, Grant, and Day counties." This finding is contradicted by the record. If SCN is present in the counties where the proposed line would pass, this is evidence that SCN may be present in the fields traversed by the proposed line.

In finding number 41 the Commission states "There was no evidence presented that construction of any transmission line caused the spread of SCN." This finding is contradicted by the record. Although Dr. Tylka was not aware of any academic studies specific to the transmission of SCN through construction practices, his actual testimony was that soil disturbed by construction equipment like that used on the Project "would likely result in greater spread of the nematode than soil disturbed by most other common occurrences." (Exhibit 102, p.3.)

Findings number 42-48 relate to the permit conditions which are, or will be imposed by the Commission when the permit is issued. In these the Commission generally finds that the Applicants' proposed mitigation plans, taken together with the additional conditions that the Commission will impose, reasonably address the SCN issue. These items may be more properly categorized mixed questions of law and fact. They are, therefore, addressed separately in sections 3-6, below.

In finding number 49, the Commission states that "the risk of spread of SCN from construction or maintenance of the Project does not pose a threat of serious injury to the environment nor to the social and economic condition of the inhabitants or expected in habitants of the siting area and does not warrant denial of the permit." Again, this finding is contradicted by the record. Dr. Tylka's

unccontested testimony was that an SCN infestation could reduce farm productivity by 50%, and that construction activities associated with the Project would spread SCN more than ordinary farming activities. This is a significant economic and environmental harm.

In finding number 51 regarding road damage and mitigation plans, the Commission references finding number 29, which is addressed above. The road damage issue itself relates to the projects' expected interference with existing farming operations, which is addressed in section 3(b)(ii) below.

In finding number 53 the Commission states "Whether the Project will decrease property values or the amount, if any of the reduction in property values is speculative." Further, "No expert testimony or other evidence was introduced as to the actual effect of construction of the Project on property values." This too may be more properly classified as a legal conclusion, but it either misstates the law or the record. Both Mr. Pesall and Mr. Schuring testified that project would reduce property values. Both of these men are property owners in the siting area. As a matter of law, they are competent to testify as to the valuation of their own property. *Sacramento Suburban Fruit Lands Co. v. Soderman*, 36 F.2d 934 (9th Cir. 1929); *Christopher Phelps & Associates, LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007); *Pfliger v. Peavey Co.*, 310 N.W.2d 742, 747-748 (N.D. 1981). Expert testimony is not required.

In finding number 54 the Commission states that because the line will meet industry standards, it "will not create health risks for person's below the transmission line." However the testimony cited by the Commission in support of this finding acknowledges that the line creates a risk of electrical discharge and fire. TR p. 195. If the line creates a risk of fire, it is inaccurate to find that the line will not create health risks.

In finding number 56 the Commission repeats its finding of need for the project over Pesall's

testimony to the contrary. In support of this the Commission cites its earlier findings which are based on the testimony of Jason Weiers, which in turn is based on the MISO studies. The Commission's error in finding need for the project is set out above. The inadmissiblity of the MISO studies is addressed in section 2, below.

Finally, in finding number 57 the Commission finds that "none of intervenor Pesall's objections warrant denial of the permit. Again, this would more properly be classified as a legal conclusion. As such, it appears to place a burden of proof on Pesall. This conflicts with S.D.C.L. 49-41B-22 which places the burden of proof on the applicants, and is addressed in section 4, below.

For these reasons, The Court should determine findings 33-57 to be clearly erroneous.

d) The Applicants' Burden of Proof: Findings 71-81.

In finding number 71, the Commission states that the conditions used in the permit order in this case are the same as those used in other transmission projects, and that those projects have not resulted in complaints to the Commission. This is not supported by any testimony or evidence in the record. Further, the conditions used in other permits are not relevant, as a matter of law, because "'An agency's view of what is in the public interest may change, either with or without a change in circumstances.'" *Interstate Telephone Co-op., Inc. v. Public Utilities Com'n of State of S.D.*, 518 N.W.2d 749, 552 (S.D. 1994) quoting *Motor Vehicle Mfrs. Ass'n. Of the United States, Inc. v. State Farm Mutual Ins. Co.,* 463 U.S. 29 (1983).

In findings number 72 through 81 the Commission again states that the Applicants have satisfied various legal obligations required to obtain a permit. The Applicants' failure to meet burden of their burden of proof is addressed in Section 3, below.

e) Remedies

The foregoing findings are clearly erroneous, or are actually flawed legal conclusions, for the reasons stated, and this Court should order that they be stricken or modified as appropriate. Because those facts must exist together to support the Commission's determination that the Applicants met their burden of proof under S.D.C.L. 49-41B-22, this Court should also conclude that the Applicant's burden has not been met, and either order that the permit be denied or remand the matter for further proceedings.

2. The Commission Improperly Admitted the MISO Studies

One of the items the Applicants offered into evidence during the evidentiary hearing was a set of four studies published by MISO between 2005 and 2012. Collectively referred to as the "MISO Studies," they were attached as Exhibit 4 and Appendices B1 through B4 in the original Application.

Gerald Pesall objected to the admission of the MISO studies into evidence as hearsay and due to a lack of foundation. He raised this objection because no records custodian, staff member, or any other MISO representative appeared to testify at the evidentiary hearing.

The Commission overruled Gerald Pesall's objection and admitted the MISO studies into evidence. Its stated basis for overruling his objection, as set out in Conclusion of Law 14, was S.D.C.L. 1-26-19. This statute permits the introduction of evidence which is not otherwise admissible when it is "necessary to ascertain facts not reasonably susceptible to proof" under the rules of evidence, and "commonly relied upon by reasonably prudent persons in the conduct of their affairs."

"Evidentiary rulings are reviewed under an abuse of discretion standard . . . However, admission of evidence in violation of a rule of evidence is an error of law that constitutes an abuse of discretion." *Dubray v. South Dakota Department of Social Services*, 2004 SD 130, ¶8, 690 N.W.2d

657, (other citations omitted.) S.D.C.L. 1-26-19 provides that the rules of evidence apply to contested administrative proceedings, and guarantees parties the right to "conduct cross-examinations required for a full and true disclosure of the facts." It also contains the hearsay exception language noted above. However, "[t]o come within [that] exception, hearsay must meet a two-pronged test: It must be probative of a fact not reasonably susceptible to proof under normal rules, and it must be of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." *Dail v. South Dakota Real Estate Commm.*, 257 N.W.2d 709 at 712 (S.D. 1977).

In this case the Commission admitted the MISO studies citing this exception, but in so doing only considered the second prong of the test. That is, it only considered whether the documents were commonly relied upon by reasonably prudent persons in the conduct of their affairs. TR. 107-110. It did not consider whether the contents of those documents were reasonably susceptible to proof under the rules, and the Applicants offered no testimony on that subject. Id.

This is the same error identified by the Court in *Dubray*, 2004 SD 130, 690 N.W.2d 657. In *Dubray*, the plaintiff sought administrative review of a DSS decision to place her name on the central registry. During the hearing, relying on this exception, the hearing officer admitted into evidence certain reports which are commonly prepared by social workers and law enforcement. The social worker(s) and officer(s) who prepared the documents did not testify, and DSS did not present any testimony as to their availability as witnesses. "Because DSS failed to make the foundational showing that the hearsay was probative of facts not reasonably susceptible of proof under the normal rules, the exhibits were erroneously admitted." *Id*, at ¶11.

In this case, there is no testimony in the record as to why nobody from MISO appeared to testify, and no other reason given as to why the contents of the reports were not reasonably susceptible

to proof under the rules.

The MISO studies are foundational to much of the rest of the testimony presented by the Applicants as to the general purpose of the project, and how it would relate the existing power lines, consumers, and generating facilities. Because it was error for the Commission to admit the MISO studies into evidence, this Court should follow *Dubray* and reverse the Commission on this conclusion.

Without the MISO studies, Applicants cannot be said to have met their burden of proof, particularly with respect to the required showing that the facility would not "unduly interfere with the orderly development of the region" as required by S.D.C.L. 49-41B-22(4). Therefore, the Court should also conclude that the Applicants have not met their burden of proof based on the record that remains and order that the permit be denied.

3. The Commission Improperly Applied the Applicants' Burden of Proof

In its conclusions of law number 15 and 16, the Commission incorrectly determined that the Applicants satisfied their burden of proof.

a) The Statutory Burden of Proof.

In proceedings before the Commission, the Applicants bear the burden of proof. The four elements of that burden of proof are set out in S.D.C.L. 49-41B-22, the full text of which is set out above.

The proposed siting area consists primarily of farmland, and family farms are the primary way in which the region has been developed. Some of these have been in continuous operation for over one hundred years. For family farms in agricultural regions, the elements in S.D.C.L. 49-41B-22 subsections 2, 3, and 4, which relate to environmental, economic, social, health, safety and developmental risks, overlap. Environmental harm that leads to crop damage will ultimately cause

social and economic harm. Economic harm can create health, safety, and welfare risks for farmers who survive based on their own ability to produce crops in a competitive global market. Economic harm to these farmers, in turn, can harm the orderly development of the agricultural region where they live. Because these elements overlap, they will be treated together below.

b) Environmental, Social, Economic, Health, Safety, Welfare and Developmental Risks

The primary points of concern for these inter-related elements, as identified at the evidentiary hearing, were (i) Transmission of SCN, (ii) Interference with Farming Activities, and (iii) Reduction in Property Values.

(i) Soybean Cyst Nematode (SCN)

The evidence presented at the hearing demonstrated that soybean production is a key element of the economy in the region, and that the SCN poses a significant threat to soybean production. Crop losses can reach up to 50% in fields where SCN is present. SCN is already present in the counties through which the transmission line would run, but is not present in every field.

Due to the presence of SCN in these counties, the proposed facility would pose a threat of serious injury to the environment, as well as the social and economic condition of the inhabitants. This is because construction of the facility would require the movement of large equipment from field-to-field, over land comprising multiple independent farming operations. It would also involve extracting, moving, and disposing of around 30 cubic yards of soil for the foundation of each individual tower.

These kinds of activities poses a serious risk of transmitting SCN from infected fields and farms to uninfected fields and farms, and of spreading SCN to new locations within individual fields. The transmission risk created by the proposed construction and maintenance operations is greater than it would be for ordinary farming operations.

The Applicants proposed a mitigation plan, but that plan was too vague to assess or enforce. For example, Applicants offered to consult with a crop pest control expert, but did not provide any criteria for what kind of expert they would consult. Applicants offered to conduct systematic sampling for SCN in the project area, but provide no information as to the actions they would take when SCN is found. Applicants offered no plan to prevent SCN from being transported by construction equipment, or through soil made friable by that equipment. And finally, Applicants offer no indication as to what they would do with the soil removed for each tower constructed on a field where SCN is present.

Because the Applicants mitigation plan is so vague, neither the Commission nor the other parties can make a meaningful assessment of how well it would work. Therefore, it cannot be said that this plan is sufficient to mitigate the threat of serious environmental, social, and economic injury risk created by the presence of SCN in the siting area.

Ultimately, S.D.C.L. 49-41B-22(2) requires that the Applicants prove that their activities will not "pose a threat of serious injury to the environment." Based on the evidence presented, they have not done so. The Court should reverse the Commission's conclusions to the contrary.

(ii) Interference with Farming Activities

In addition to the serious threat of environmental, social and economic harm which would be caused by field-to-field transmission of SCN during the construction of the proposed line, the evidence presented at the hearing also demonstrated a series of ways in which the proposed facility would harm the health, safety, and welfare of area residents.

These included, but were not limited to (1) Increased landowner liability due to the potential for collisions between farm equipment and the towers or wires, (2) Reduced ability to conduct aerial spraying, (3) Increased risk of injury and decreased productivity due to limitations on handling of fuel

near the lines, (4) Lack of a mechanism to address harm to average field production levels for crop insurance purposes. (5) Increased overhead and time lost accommodating the presence of the lines.

Individually, these items may not rise to the level of "serious injury" to social and economic conditions, or "substantial impairment" contemplated by SDCL 49-41B-22(2) and (3) but they must be considered in the aggregate, not individually. Each of these issues requires each farm to spend extra time and money, every year, to accommodate the lines and the risks they create. When accidents happen, area residents will have to accept those losses as well. Together with the inherent damage which would result from SCN transmission, the evidence tells us that this proposed facility would substantially impair the health, safety and welfare of the inhabitants.

The crop insurance element is particularly problematic. Ample evidence showed that crop damage would happen during construction and maintenance of the line, and that this would reduce average yields on affected fields. These reduced averages would result in reduced payments to producers who later make crop insurance claims. Applicants' mitigation plans did not address the issue. Although the Commissioners themselves expressed concerns about this during the hearing, TR. pp. 88-90, the Commission failed to make any findings of fact or conclusions of law on the subject in the Final Decision and Order.

Finally, S.D.C.L. 49-41B-22(4) requires the applicants to demonstrate that the proposed facility "will not unduly interfere with the orderly development of the region, with due consideration having been given the views of governing bodies of affected units of local government." It is uncontested that the region has been developed primarily for agricultural production. It is clear from the evidence that the proposed facility would interfere with that production. It is uncontested that all of the local governing bodies who have made written comments to the Applicants on the subject have opposed it.

There is no evidence of any perceptible benefit to area residence in terms of reliability or cost for their electrical services.

It is important to note that, for this last element, the legal standard is "undue interfere[nce]" This is a much more restrictive standard. To meet it, Applicants need to prove more than just the absence of harm or the risk of harm. For this element, the Applicants must prove that the aggregate impact of the proposed facility will not cause undue interference with the region, with heavy weight given to the opinions of local government.

In order to determine whether the line's interference is "undue", the Commission must weigh all of the aggregate risk, harm, and interference this project will create against the purported benefits it would produce. Here again, the Applicants failed to meet that burden.

Applicants were unable to identify any benefits which would be observed by individual consumers in South Dakota. Applicants did not identify any permanent new jobs which would be produced in the region. No generating facilities in the region would make use of this line. Apart from the taxes it would pay, the only benefit for this line which Applicants have shown is that it, as one of 17 other projects, is may reduce competition for existing lines and make it easier for the Applicants to meet renewable portfolio standards without building new generating facilities.

These few benefits, weighed against the negative impact the line would have on the region, demonstrate that this project would "unduly interfere with the orderly development of the region." The lack of any provision to address crop insurance, together with the other economic burdens the project places on farmers, further demonstrate that this project poses a threat of serious economic injury. This Court should conclude, therefore, that the Applicants have, therefore, failed to prove otherwise.

(iii) Property Devaluation

The last major issue which must be examined in determining whether Applicants have met their burden of proof is the impact the proposed facility would have on property values. Separate and apart from the day-to-day activities of farms and units of local government, the value of the land itself is a significant economic factor.

In this regard, the only credible evidence was the testimony from the farmers themselves. As noted in section 1(c) above, they are competent to testify as to the value of their own property. They testified that the construction of the line would reduce the value of property over which it passes. Applicants made assertions to the contrary, but these were unsupported by any studies or testimony in evidence.

Under S.D.C.L. 49-41B-22 (2) the Applicants have the burden of proving that their activities will not pose a threat of serious economic injury. Because the property devaluation is a significant economic issue, and because they have offered no credible evidence to contradict the testimony by Mr. Schuring and Mr. Pesall, Applicants cannot be said to have met their burden of proof under this section.

4. The Commission Improperly Placed a Burden of Proof on the Intervenors

In conclusion of law number 18, the Commission states that "The Intervenors have not presented evidence sufficient to deny the permit under the applicable statutes and Commission regulations." The Commission cites no legal support for this conclusion.

S.D.C.L. 49-41B-22 places the burden of proof on the Applicants. As with courts in civil matters, the general standard of proof for administrative hearings is by a preponderance, or greater convincing weight, of the evidence. *Dillinghan v. North Carolina Dept. of Human Resources*, 513 SE2d 823 (N.C. App. 1999). Each element to be proved must be established by reliable, probative, and

substantial evidence, such that the judge can conclude that the existence of facts supporting the claim are more probable than their nonexistence. *U.S. Steel Min. Co., Inc. v. Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor*, 187 F.3d 384 (4 th Cir. 1999).

By making conclusion number 18, the Commission reveals an implicit error in its application of the law. The burden of proof in this case is not one that can be shifted to the Intervenors. The burden of proof remains on the Applicants throughout the proceedings. The Commission must base its decision on the elements of S.D.C.L. 49-41B-22 in light of the entire record. Where Intervenors raise legitimate concerns, the burden is on the Applicants to present evidence to address them.

Because the Commission improperly placed a burden of proof on the intervenors, when no legal basis to do so exists, its decision is affected by an error of law within the contemplation of S.D.C.L. 1-26-36(4). Therefore, this Court should reverse the Commission on this conclusion of law, and either deny the permit or remand for further proceedings.

5. The Commission Improperly Delegated Its Authority

In transmission line cases, S.D.C.L. 49-41B-24 directs the Commission to deny, grant, or grant "upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission may deem appropriate" within twelve months of the application filing date. S.D.C.L. 49-1-17 expressly prohibits the Commission from delegating that authority to any other party. In a similar transmission line case where topsoil was to be removed during tower installation, the Court ruled that the Commission could not delegate the decision of what to do with that topsoil to local land-owners. Conditions of the permit had to be determined by the Commission itself. *Application of Nebraska Public Power Dist.*, 354 N.W.2d 731, 719 (S.D. 1984.)

In this case, as a result of the Applicants' inaction and the statutory twelve-month limit, the

Commission engaged in exactly the sort of delegation that the law prohibits.

The Application was filed on August 23, 2013. Therefore, the Commission was required to issue a ruling by August 23, 2014. Although the Applicants submitted partial mitigation plans for review by the Commission before the final ruling date, none of those plans dealt with basic issues like how field-to-field transmission of SCN would be prevented, or what would be done with the 30 cubic yards of potentially contaminated topsoil that would be removed at the base of every tower constructed.

In this situation, the Commission should have denied the Application and instructed the Applicants to re-apply once they had a complete SCN mitigation plan to present. Instead, the Commission attempted to address the SCN issue without denying the permit by including the following provision on page 15 of its Final Decision and Order (the SCN Mitigation Clause):

> "After Applicants have finished the soil sample field assessment in accordance with the specifications for such assessment prepared in consultation with an expert in the proper methodology for performing such a sampling survey, Applicants shall submit to the Commission a summary report of the results of the field assessment and Applicants' specific mitigation plans for minimizing the risk of the spread of soybean cyst nematode from contaminated locations to uncontaminated locations. At such time and throughout the construction period, one or more Commissioners or Staff shall have the right to request of Applicants confidential access to the survey results to enable verification of the survey results, assess the appropriateness of the mitigation measures to address such results, and monitor the execution of the plan during construction."

This provision, if put into effect, would delegate to the Applicants the authority to write their own permit conditions. As in *Nebraska Public Power Dist.*, supra, such a provision constitutes an unlawful delegation Commission authority.

The SCN Mitigation Clause is an essential element to the Commission's other findings and conclusions about the Project's impact on the environmental, social, and economic impact on the inhabitants of the siting area. Therefore, this Court should reverse the Commission on the SCN Mitigation Clause, and either deny the permit or remand for further proceedings.

6. The Commission Exceeded the Twelve Month Limit

As noted above, S.D.C.L. 49-41B-24 gives the Commission twelve months from the application date in which to issue a ruling. That ruling, when issued, must either grant, deny, or grant the application subject to conditions set by the Commission. Assuming, for purposes of this section, that the Commission did not improperly delegate its authority though the SCN Mitigation Clause, then what that clause effectively does is extend the Commission's ability to write permit conditions beyond the twelve-month limit.

This is an order "in excess of the statutory authority of the agency" within the contemplation of S.D.C.L. 1-26-36(2). Again, the SCN Mitigation Clause is essential to the Commission's other findings and conclusions regarding the project. Therefore, this Court should reverse the Commission and either deny the permit or remand for further proceedings.

CONCLUSION

Gerald Pesall is asking this Court to reverse the Commission on myriad legal and factual points, and either order that the permit be denied or remand the matter back to the Commission for further proceedings. This Court has the authority to do so under S.D.C.L. 1-26-36. Upon a denial, the Applicants would be free to re-apply for their permit pursuant to S.D.C.L. 49-41B-22.1 provided they could assemble enough evidence and prepare adequate mitigation plans to meet their burden of proof.

The challenged findings of fact are clearly erroneous because they are unsupported by the record, contradicted by the record, or are actually flawed legal conclusions. Therefore, this Court should strike or modify them as set out above. Because all of the challenged facts must exist together to support the Commission's determination that the Applicants met their burden of proof under S.D.C.L. 49-41B-22, this Court should also conclude that the Applicant's burden has not been met, or

in the alternative, remand for further review by the Commission.

The Commissions decision to admit the MISO Studies pursuant to S.D.C.L. 1-26-19 is legally incorrect and constitutes an abuse of discretion, because it did not follow the two-part analysis established in *Dail*. The Commission failed to make any findings as to whether the studies were not reasonably susceptible to proof under the rules of evidence, and no testimony on that subject was offered. The studies, and the testimony based upon them, should be stricken. Without the MISO studies, and the testimony based upon them, the record is insufficient to support the Commission's determination that the Applicants met their burden of proof under S.D.C.L. 49-41B-22. Again, this Court should conclude that the Applicant's burden has not been met, or in the alternative, remand for further review.

The Commissions conclusion that the Applicants met their statutory burden of proof is incorrect, not only because of the factual and evidentiary issues above, but also because it conflicts with the facts. It is undisputed that SCN can cause 50% crop losses, and would be readily transmitted from field-to-field by construction equipment. This is a major economic and environmental harm for which no complete mitigation plan exists in the record. The line itself would depress property values, increase risk of injury and liability to landowners, burden them with time-consuming accommodation activities, decrease overall productivity, and reduce the protection they get from crop insurance. (The crop insurance issue is entirely omitted from the Final Decision and Order.) In the aggregate these risks rise to the level of environmental, economic, social, and safety harm that the law prohibits. Again, the Court should conclude that the Applicants' burden has not been met.

The Commission's decision to place a burden of proof on the Intervenors is legally flawed as well, because S.D.C.L. 49-41B-22 places the burden of proof on the Applicants throughout the

proceedings. The ultimate decision must be based on the entire record, and the burden is on the Applicants to present evidence sufficient to address any legitimate issues raised by the Intervenors or the Commission. Therefore, this Court should reverse the Commission as to this conclusion of law.

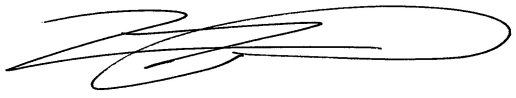
The Commission's decision to delegate the authority to draft a final SCN mitigation plan as a part of the permit directly violates S.D.C.L. 49-1-17. The SCN Mitigation clause is essential to the Commission's other conclusions about the environmental and economic impacts of the project. Therefore, this Court should order that the provision be stricken as unlawful, and conclude that the Applicants' burden has not been met.

Even if the SCN Mitigation Clause were lawful on its face, the Commission does not have the statutory authority to impose it, because this provision effectively extends the Commission's ability to impose permit conditions beyond the twelve-month period established in 49-41B-24. Again the SCN Mitigation clause is essential to the Commission's other conclusions. Therefore, this Court should order that the provision be stricken as unlawful, and conclude that the Applicants' burden has not been met.

REQUEST FOR ORAL ARGUMENT

Gerald Pesall requests the opportunity for oral argument.

Dated this 4th day of November, 2014



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