IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
****

Gerald Pesall, Appellant

v.

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

APPEAL FROM THE PUBLIC UTILITIES COMMISSION
IN DOCKET NUMBER EL13-028
PIERRE, SOUTH DAKOTA
****

CIV. 14-53
****

BRIEF OF APPELLEES
****

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INTRODUCTORY STATEMENT

The Legislature created the Public Utilities Commission ("the Commission") in order to, among other things, regulate electric utilities in South Dakota. Due to their expertise regulating utilities, the Commission's decisions are entitled to deference by the courts. As part of its regulatory obligations, the Commission here decided whether to grant Appellees Montana Dakota Utilities Co. and Otter Tail Power Company (collectively referred to as "Applicants") a facility permit authorizing Applicants to construct and operate a high voltage transmission line through Brown, Grant, and Day Counties. In order to obtain that permit, Applicants needed to prove four statutory requirements by a preponderance of the evidence. After hearing the evidence at a contested case hearing, the Commission found Applicants met their burden of proof, and the Commission entered detailed findings of fact granting the permit. In order to confirm compliance with the statutory requirements, the Commission also imposed 33 separate conditions on the permit, which are incorporated into the Commission's order granting the permit.

Essentially asking this Court to reweigh the evidence, Appellant Gerald Pesall's ("Pesall") arguments in this appeal primarily focus on factual issues. On these factual issues, the standard of review demands affirming the Commission's decision granting the facility because the Commission's factual findings are not clearly erroneous. Nor did the Commission abuse its discretion in admitting into evidence the publicly filed transmission planning studies ("MISO Studies") which were relied upon as part of the basis for expert testimony at the contested case hearing. Finally, distorting the Commission's decision, Pesall argues that: (1) the Commission wrongfully delegated its authority to set conditions on the permit, or in the alternative, (2) the Commission failed to comply with the statutory requirement to issue a ruling on the application

for the facility permit ("the Application") within one year. These arguments are simply incorrect and the Commission properly followed all legal requirements when it granted the permit. Instead, the only really disputed issues are questions of fact, which the Commission found in favor of the Applicants. These contested factual issues cannot for the basis for reversal.

JURISDICTIONAL STATEMENT

Applicants agree this Court has jurisdiction as described in Pesall's jurisdictional statement.

STATEMENT OF THE ISSUES

I. Whether the Commission's Detailed Findings of Fact on the Contested Factual Issues Are Clearly Erroneous.

After hearing the evidence, the Commission entered 82 detailed findings of fact supporting the Commission's Decision granting the permit.

SDCL 1-26-36
In re Otter Tail Power Co. ex rel. Big Stone II, 2008 SD 5, 744 N.W.2d 594
Abild v. Gateway 2000, Inc., 1996 SD 50, 547 N.W.2d 556
Lends His Horse v. Myrl & Roy Paving, Inc., 2000 SD 146, 619 N.W.2d 516

II. Whether the Commission Clearly Erred in Finding Applicants Met their Burden of Proving Each of the Statutory Requirements for Issuance of the Facility Permit.

The Commission found that Applicants proved each of the elements for issuance of the facility permit by the preponderance of the evidence.

SDCL 49-41B-22
Permann v. S.D. Dep't of Labor, 411 N.W.2d 113 (S.D. 1987)
In re Dorsey & Whitney Trust Company, LLC, 2001 SD 35, 623 N.W.2d 468

III. Whether the Commission Committed Prejudicial Error in Admitting the MISO Studies, Which Were Authenticated Through Testimony; Which Are Publicly Filed FERC Documents; and Which Are Cumulative of Other Evidence.

The Commission admitted the MISO Studies over Pesall's foundation objection.

SDCL 1-26-19
SDCL 19-17-1
SDCL 19-15-3

SDCL 19-16-12
Vivian Scott Trust v. Parker, 2004 SD 105, 687 N.W.2d 731
Jenner v. Dooley, 1999 SD 20, 590 N.W.2d 463
Dubray v. S.D. Dep't of Social Servs., 2004 SD 130, 690 N.W.2d 657

IV. Whether the Commission Improperly Delegated its Authority to Impose Terms and Conditions for Issuance of the Facility Permit.

The Commission granted the facility permit subject to the terms and conditions imposed by the Amended Settlement Stipulation and the Commission's Decision.

SDCL 49-1-17
Application of Nebraska Public Power Dist., 354 N.W.2d 713 (S.D. 1984)

V. Whether the Commission Complied with its Obligation to Rule on the Application for the Permit Within One Year of the Filing of the Application.

The Commission issued the Decision granting the permit on August 22, 2014, which was less than one year after the filing of the Application on August 23, 2013.

SDCL 49-41B-24

STATEMENT OF THE CASE

In order to construct and operate a 345-kV transmission line in South Dakota, Applicants need a facility permit issued by the Commission. After Applicants filed the Application, both local governments and landowners near the proposed route for the facility are provided notice of the Application. The Commission must hold public input hearings, three of which occurred in this case. Consistent with the procedures articulated in SDCL Ch. 1-26, the Commission must decide whether Applicants have met the four requirements of SDCL 49-41B-22 for issuance of the facility permit and issue findings of fact and conclusion of law.

Applicants filed an extensive and detailed 111-page application with the Commission requesting a facility permit for the construction and operation of a 345-kV electric transmission line between a new substation near Ellendale, North Dakota and a substation near Big Stone City, South Dakota. The Commission granted Intervenor Pesall party status on November 6,

2013, and Intervenors Schuring Farms, Inc. and Bradley Morehouse party status on May 1, 2014. Pesall, Schuring Farms, and Morehouse objected to issuance of the Permit, and as a result, the Commission held a contested case hearing on June 10 and 11, 2014.

Before the contested case hearing, the Commission's Staff and Applicants entered into a settlement stipulation that recommended granting the permit subject to 33 terms and conditions. This Settlement Stipulation was presented along with hundreds of pages of documentary evidence and oral testimony of nine witnesses at the evidentiary hearing. The Commission Staff and the Applicants also agreed to an Amended Settlement Stipulation during the evidentiary hearing which was entered into the record. After hearing the evidence and reviewing the parties post-hearing submissions, the Commission issued 82 findings of fact ("FOF"), 20 conclusions of law ("COL"), and an order granting the permit ("the Decision") on August 22, 2014. The Commission granted the facility permit subject to the terms and conditions in the Amended Settlement Stipulation as modified by the Decision. Pesall appeals to the Circuit Court. Neither Schuring Farms nor Morehouse filed a notice of appeal.

STATEMENT OF THE FACTS

Applicants filed the Application seeking a facility permit for construction and operation of 160 to 170 miles of 345kV transmission line between a new substation to be built near Ellendale, North Dakota and a substation near Big Stone City, South Dakota ("the Project"). (FOF 2). The Project will be jointly owned approximately fifty percent each by Montana Dakota Utilities Co. ("MDU") and Otter Tail Power Company ("OTP"). (FOF 2, 5).

A. The Project

The Project's 345-kV transmission line will run south from Ellendale and enter South Dakota in northern Brown County. (FOF 11). The transmission line will then route through

Brown, Grant, and Day Counties before terminating at a substation near Big Stone City in Grant County, South Dakota. (*Id.*). Approximately 150 to 160 miles of transmission line will be located in South Dakota. (*Id.*). The Project is estimated to cost between $293 and $370 in 2013 dollars. (FOF 13).

As designed, the transmission line will use steel monopoles approximately 120 to 155 feet above ground. (FOF 12). The poles will be placed on concrete foundations approximately 6 to 11 feet in diameter. (*Id.*). The structures, which consist of poles, foundations, and cross-arms, will be placed approximately every 700 to 1,200 feet. (*Id.*). The Project thus will have five to six structures per mile of transmission line. (*Id.*). The transmission line clearances will conform to National Electrical Safety Code (NESC) standards with a minimum ground clearance of 30 feet. (*Id.*). Structures will be placed inside fields to allow farmers to farm around the structures. (FOF 30).

Before filing the Application, the Applicants conducted an extensive route selection process that considered several factors. (FOF 25). As part of the route selection process, Applicants engaged in over a year of public input and outreach. (Ex. 1, at § 8.1). Based on this route selection process, Applicants selected the route in the Application. (FOF 25).

As required by statute, notification of the Application was provided to the following local governmental bodies: Brown County, Grant County, Day County, City of Frederick, City of Twin Brooks, City of Westport, City of Groton, City of Andover, City of Butler, Big Stone City, and City of Milbank. (CR 1064-65).[1] Additionally, the Commission scheduled public input hearings in Aberdeen and Milbank, South Dakota, on October 17, 2013. (CR 1040-43). All landowners located within one-half mile of the proposed route received notice of the Application

[1] Cites to 'CR" refer to the Certified Record. Cites to "TR" refer to the evidentiary hearing transcript. Cites to "Ex." Refer to exhibits at the evidentiary hearing.

and the public input hearings. (CR 1069-92). The Commission heard over six hours of public comments at the public input hearings.

Following the October public input hearings, the Applicants continued to make adjustments to the Project route in light of comments from landowners. (FOF 26). Because these route changes resulted in additional landowners located within one-half mile of the Project, the Commission held an additional public input hearing in Aberdeen, South Dakota, on May 20, 2014. At this third public input hearing, the Commission heard over four hours of public comments.

B. Pesall and Four Other Landowners Intervene and the Parties Complete Discovery

On October 18, 2014, Pesall filed for intervention. (CR 1477). The Commission granted Pesall party status on November 6, 2013. (CR 1513).

The Project crosses one parcel of Pesall's farm ground. (FOF 6). Only two monopole structures will be placed on Pesall's property. (Ex. 21A-C, TR 290). The poles will be more than one-half mile from Pesall's residence. (*Id.*). Additionally, the structures will be placed on open farm ground with no other obstructions. (FOF 36; Exs. 21A-C). Based on Pesall's testimony, the Commission expressly found Pesall's objection is less an objection to the issuance of the Permit but instead an objection to placement of the transmission line on his property. (FOF 37).[2]

In addition to Pesall, on May 1, 2014, the Commission granted intervenor status to the following landowners: Schuring Farms, Inc., Bradley Morehouse, James McKane, III, Clark Olson, and Kevin Anderson. (CR 3525). Intervenors McKane, Olson, and Anderson did not participate in the evidentiary hearing, present any evidence for consideration, or state whether

[2] Statutorily, the Commission cannot determine the route for the Project. (COL 17). *See also* SDCL 49-41B-36.

they objected to issuance of the permit. (FOF 9). Intervenor Schuring Farms, Inc., through its owner Randy Schuring, and Bradley Morehouse participated and presented evidence at the evidentiary hearing on the permit. Neither Schuring Farms, Inc., nor Morehouse appealed the Decision.

As part of the discovery in this contested case proceeding, Applicants answered 48 separate data requests from the Commission Staff. (Exs. 2, 3). Applicants also answered 32 interrogatories from Pesall. (Exs. 4, 5). These discovery responses were admitted into evidence without objection at the evidentiary hearing.

During the discovery process, Pesall raised concerns regarding the spread of Soybean Cyst Nematode ("SCN")[3] from construction of the Project. Pesall's identification of SCN raised a new issue for the Applicants. (TR 33). In Applicants' prior experience of constructing, operating, and maintaining over 5,700 miles of transmission lines in North Dakota, South Dakota, Minnesota, Montana, and Wyoming, the construction and maintenance of transmission lines had not materially contributed to the spread of soil borne pests. (Ex. 5, at Interrogatory No. 9). Additionally, before Pesall, none of the 500 landowners who attended the Project's open houses expressed any concern over SCN. (TR 153). As a result, when Pesall raised the spread of SCN as a concern, the Project investigated SCN and developed an appropriate mitigation plan. (TR 33; Exs, 16B, 16C, 23).

Following discovery, Applicants filed prefiled testimony of the following expert witnesses: Henry Ford, Jason Weiers, Angela Piner, Danny Frederick, and Jon Leman. (Exs. 16-20). Henry Ford also filed rebuttal and supplemental rebuttal prefiled testimony. (Exs. 16B,

[3] SCN is a parasitic microscopic worm that feeds on the outside of the roots of soybean plants. (TR 229-233). Each female SCN can generate up to 200 eggs, and because the eggs are cysts, the eggs can survive up to ten years after the death of the female SCN. (*Id.*). Each pregnant SCN female is the size of a newspaper period. (*Id.*) Anything that spreads soil can spread SCN. (*Id.*).

16C). This prefiled testimony was all admitted into evidence at the evidentiary hearing without objection.

Before the evidentiary hearing on the permit, the Applicants and the Commission Staff entered into a settlement stipulation ("Settlement Stipulation") in which the Commission Staff recommended issuance of the permit approval of the permit subject to the conditions in the settlement stipulation. (CR 5646-61; Ex. 301). The Settlement Stipulation addressed 33 separate conditions for issuance of the permit, including among other things: requirements to provide safety information to landowners; adoption of an SCN mitigation plan including consultation with a crop pest expert; restoration of top soil; repair or replacement of damaged private property, compensation to landowners for crop losses arising as a result of construction and maintenance; and mitigation steps to avoid impact of the Project on agriculture. (Ex. 301).

C. The Commission Hears the Evidence, Including Pesall's Objections, and Specifically Finds Applicants Met Their Burden of Proof for Issuance of the Permit

The Commission held an evidentiary hearing regarding the permit on June 10 and 11, 2014. Based upon the testimony at the evidentiary hearing, the Applicants and the Commission Staff entered into an Amended Settlement Stipulation which was entered into the record without objection. (Ex. 301A).

As established at the hearing, there is a need for the Project. (FOF 14-19). The Project was approved as part of a group of transmission projects contained in the Midcontinent Independent System Operator ("MISO") multi value project portfolio ("MVPs"). (FOF 15; Ex. 17, at pp.15-16). MISO is a not for profit, member based regional transmission organization. (Ex. 17, at p.5). MISO engaged in extensive studies that support the demand for the Project and the many benefits derived from the Project, along with other MVPs. This analysis is contained

in Jason Weiers's prefiled testimony and Exhibits B-1 through B-4 of the Application. (Ex. 1; Ex. 17).

The Project will be used to transport electrical supply to and from lower voltage transmission and distribution lines for delivery to retail customers, including customers in South Dakota. (FOF 14). Specific to South Dakota, the Project will increase reliability of the transmission network which will help utilities provide more reliable service. (FOF 15; TR 105-07, 113-14). Additionally, construction of the Project will facilitate future wind generation, including wind generation in northeastern South Dakota. (FOF 17-19; Ex. 17, at pp.23-27; TR 105-06, 118-20, 139). The Project will also provide millions of dollars in additional tax revenues as well as millions of dollars in economic benefits from the construction. (FOF 21-22).

Another key issue at the evidentiary hearing related to the spread of SCN. Substantial evidence indicated that the construction of the Project will not materially increase the spread of SCN. Although SCN is present in Brown, Grant, and Day Counties, there was no evidence presented indicating whether the specific parcels on the Project route are infected with SCN. (FOF 40). At the time of the evidentiary hearing, even Pesall did not know whether his property is infected with or free of SCN. (TR 246). Additionally, no academic studies confirm construction of transmission lines causes the spread of SCN. (TR 246). Conversely, Dr. Tylka, testifying on behalf of Pesall, admitted that SCN is spread by wind, water erosion, birds, typical farming practices, and even boots. (FOF 41; TR 244-45, 256-57, 259-60, 270-71). Once a field is infected with SCN, there is no way to determine how the field was infected. (TR 256-57). Further, even if infected, farmers can employ mitigation techniques to reduce the impact of SCN, such as growing non-host crops, including non-host crops in a crop planting rotation, and planting SCN resistant variety seed. (FOF 46; TR 248).

Despite the lack of evidence indicating Project construction will actually spread SCN, Applicants investigated SCN and created a mitigation plan after Pesall raised the issue. (TR 34-36; Ex. 23). As part of the SCN Mitigation Plan, Applicants will test each parcel of tilled ground that the Project crosses to determine if the parcel is infected with SCN. (*Id.*). Depending on the density of infected parcels, the Applicants will choose the most appropriate mitigation technique for the parcel, such as cleaning stations, using "clean" construction crews and "dirty" construction crews, equipment mats, and weather dependent construction. (Ex. 23; TR 34-26, 83-85).

After hearing this evidence, the Commission found the risk of spreading SCN did not warrant denying the permit. (FOF 48-49). The Commission expressly found Applicant's SCN Mitigation Plan, as modified by the conditions imposed by the Amended Settlement Stipulation and the Decision, will reasonably minimize the risk of spreading SCN during the construction. (FOF 48). As found by the Commission, the steps employed by Dr. Tylka's research teams to prevent spread of SCN confirms the appropriateness of Applicants' SCN Mitigation Plan. (FOF 43). When working in infected fields, Dr. Tylka's teams just knock as much dirt off their boots and equipment as possible. (*Id.*; TR 258-60). Similarly, when moving equipment from field to field, Pesall just uses a hammer to knock dirt off his equipment. (FOF 43; TR 295).

Regarding the Project's effect on agricultural practices, the Commission specifically found the Applicants adopted "reasonable measures to minimize the effect of the Project on farming practices." (FOF 30). These mitigation efforts include the use of monopoles, placing structures inside the field to allow farming around structures, creating spans of 700 to 1,200 feet, and working with landowners to reasonably address the effect of the Project on farming practices. (FOF 30; Ex. 1, at §§ 10.2.2, 14.1.2, 19.2; Ex. 301). The Project will not harm

livestock production. (FOF 33; Ex. 20, at pp.7-8). The Project does not pose a safety concern to persons in farm equipment. (FOF 52; TR 193-94, 197, 208-10). Although landowners should not refuel equipment under the transmission line for safety concerns, this safety issue is mitigated by the Amended Settlement Stipulation which requires Applicants to provide landowners detailed safety information regarding the Project. (Ex. 301A, at ¶ 4(b)).

Finally, regarding devaluation of farm land, the Commission rejected Pesall's testimony about the purported devaluation as speculative. (FOF 53). Pesall did not present any expert testimony about the alleged devaluation effect of the transmission line on his farmland. (*Id.*). The Applicants presented evidence that the transmission line, which will only have approximately five to six structures per mile, will not materially decrease agricultural land values due to the small footprint of the Project. (Ex. 1, § 19.1.2; Ex. 4, Interrogatory No. 2; TR 52-5; Ex. 2, at Data Request 1-6).

Following the evidentiary hearing, Applicants and Pesall submitted post-hearing submissions. The Commission's prehearing conference order imposed a deadline for July 18, 2014, for the parties to simultaneously file post-hearing briefs and proposed findings of fact and conclusions of law. (CR 5642). Pesall filed a post-hearing brief but did not submit proposed findings of fact and conclusions of law. Pesall did not file objections to Applicants' Proposed Findings of Fact and Conclusions of Law.

On August 22, 2014, the Commission issued Findings of Fact and Conclusions of Law along with the Decision granting the facility permit subject to the terms and conditions in the Amended Settlement Stipulation along with an additional modification to condition 17 relating to the SCN Mitigation Plan. (CR 8324-41). Pesall appealed to the Circuit Court.

ARGUMENT

For the issuance of the facility permit, Applicants must prove four statutory requirements imposed by SDCL 49-41B-22, which states:

> 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 to the social and economic condition of inhabitants or expected inhabitants in 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.

SDCL 49-41B-22. Applicants must prove each of these requirements by the preponderance of the evidence. *See Irvine v. City of Sioux Falls*, 2006 SD 20, ¶ 10, 711 N.W.2d 607, 610-11 ("Generally, the burden of proof for administrative hearings is preponderance of the evidence."). In evaluating the Application, the Commission lacks authority to "route a transmission facility," such as the Project. SDCL 49-41B-36.

Here, after hearing the evidence, the Commission specifically found Applicants met their burden of proving each of these requirements by the preponderance of the evidence. (FOF 72-77). The Commission thus followed the law and issued the facility permit. Pesall attacks these factual determinations in this appeal.

SDCL 1-26-36 sets this Court's standard for reviewing the Commission's decision. Factual findings are reviewed under the clearly erroneous standard. *See In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26, 744 N.W.2d 594, 602. "'A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely

and firmly convinced a mistake has been made.'" *Id.* (quoting *Tebben v. Gil Haugen Const., Inc.*, 2007 SD 18, ¶ 15, 729 N.W.2d 166, 171).

A court must sustain any findings supported by substantial evidence. *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, ¶ 6, 547 N.W.2d 556, 558. ("The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them."). On factual issues, courts "give great weight to the findings and inferences" made by the Commission. *Woodcock v. City of Lake Preston*, 2005 SD 95, ¶ 8, 704 N.W.2d 32, 34. This Court cannot substitute its view of the evidence for the Commission's view. *City of Brookings v. Dep't of Environmental Protection*, 274 N.W.2d 887, 890 (S.D. 1979).

Further, the South Dakota Supreme Court has recognized the Commission is an administrative agency with expertise. *In re W. River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 25, 675 N.W.2d 222, 229-30. As such, courts "give 'appropriate deference to [Commission's] expertise and special knowledge in the field of electric utilities.'" *Id.* (quoting *In re Northern States Power Co.*, 489 N.W.2d 365, 370 (S.D. 1992)).

I. The Commission's Detailed Factual Findings, Based on Hundreds of Pages of Evidence and Days of Testimony, Are Not Clearly Erroneous.

Pesall argues that dozens of the Commission's factual findings are clearly erroneous. (Pesall's Brief at p.14). Pesall's argument should be rejected. As an initial matter, Pesall failed to preserve his argument that the findings were clearly erroneous. Additionally, even if Pesall preserved his argument, none of the Commission's findings are clearly erroneous.

A. Pesall's Failure to Propose Findings of Fact And File Objections to Applicants Findings of Fact Limit This Court's Review of the Facts

The Commission's regulations require parties to file findings of fact and conclusions of law if requested by the Commission. ARSD 20:10:01:25 ("If requested by the commission, the parties shall file proposed findings of fact."). In this case, the Commission requested findings of fact and conclusions of law in its prehearing conference order. (CR 5642). Pesall did not file any proposed findings of fact. Nor did he file objections to Applicants' proposed findings of fact and conclusions of law.[4] Because Pesall did not comply with the Commission's directive to file proposed findings of fact and conclusions of law, and because he did not file objections to the Applicants' findings of fact and conclusions of law, Pesall failed to preserve his ability to contest the Commission's factual findings on this appeal. *See Tri-City Assocs., L.P. v. Belmont, Inc.*, 2014 SD 23, ¶ 18, 845 N.W.2d 911, 916. As a result, this Court's review is limited to whether the Commission's findings support its conclusions of law. *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 SD 82, ¶ 11, 700 N.W.2d 729, 733.

B. Even if Pesall's Preserved His Objection to Findings of Fact, The Commission's Findings Are Not Clearly Erroneous

Ignoring the extensive evidence presented by the Applicants and marginalizing the Commission's fact finding role, Pesall essentially argues the Commission's findings of fact are clearly erroneous because the Commission rejected Pesall's objections to the Application. Pesall cannot, however, relitigate the facts on this appeal.

In this case, the Commission was provided an extensive record to support the permit including: a docket exceeding 8,000 pages; over 100 pages of prefiled testimony; hundreds of

[4] Pesall did criticize several of Applicants' proposed findings of fact in the his post-hearing reply brief. (CR 8160-8168). Pesall did not, however, file objections to the proposed findings of fact.

pages of exhibits; and oral testimony from nine different witnesses, including six experts. Based on this extensive record, the Commission entered 82 separate findings of fact.

Pesall attacks three categories of findings: (1) findings regarding need for the Project; (2) findings regarding Applicant's mitigation plans; and (3) findings rejecting Pesall's objections to the Project.

1. The Findings of Need for the Project

Regarding the "need" for the Project, the Commission entered nine separate findings of fact describing the need and benefits of the Project. (FOF 14-19, 21-24). Tellingly, Pesall does not even attempt to argue all of these factual findings are clearly erroneous. Instead, he only attacks Findings 14, 21, and 22.

Finding 14 states:

> The Applicants presented evidence of need for the Project. TR 105-07, Ex. 1 § 6.0. 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, including customers located in South Dakota. The Project also will facilitate development of future wind generation projects located in eastern South Dakota.

(FOF 14).

Substantial evidence supports Finding 14 in that the Project will help serve customers, including customers in South Dakota. Jason Weiers, a registered professional engineer with over 14 years of experience in transmission planning, testified about the need for the Project. (Ex. 17; TR 104-07). Weiers specifically testified that if the Project is not built, then the existing transmission network in eastern South Dakota will not be able to provide reliable service to customers in the State. (TR 107, 113-14). Weiers also explained that electricity can flow either direction on the Project and each substation, including the Big Stone South Substation in South Dakota, provides an opportunity for electricity to flow onto lower voltage transmission lines and

distribution lines serving customers in the area. (TR 117-18). As described by Weiers, the Project is akin to an interstate highway system with each substation being an exit ramp for electricity. (*Id.*).

There also is substantial evidence supporting Finding 14's determination that the Project will facilitate future wind generation projects in northeastern South Dakota. Weiers directly testified about this benefit of the Project. (TR 139). Further, in addition to Finding 14, the Commission entered four findings of fact discussing the impact of the Project on wind generation. (FOF 16-19). Pesall does not contest these additional findings, which are all supported by direct citation to the record.

Despite the extensive testimony indicating the Project will facilitate future wind generation, Pesall attacks Finding 14 (and the supporting testimony of Weiers) as "contradicted by the overwhelming ***weight*** of the evidence." (Pesall's Brief at p.15 (emphasis added)). This Court does not, however, weigh the evidence on appeal. *See Lends His Horse v. Myrl & Roy's Paving, Inc.*, 2000 SD 146, ¶ 9, 619 N.W.2d 516, 519 (stating the court does not substitute its judgment for that of the Commission regarding weight of the evidence).

Pesall also attacks Findings 21 to 23 addressing the economic benefits of the Project. (Pesall's Brief at pp.15-16). Once again, these findings are supported by substantial evidence. The Applicants presented evidence of the increased tax benefits associated with the Project, the economic development to local economies as a result of construction spending, and the overall benefits and cost savings of the MVP Portfolio, of which this Project is a part. (Ex, 1, at §§ 4, 19.1, 20; Ex. 2, at Data Request 1-5; Ex. 4, Interrogatory No. 7; Ex. 3, Data Request 2-4; Ex. 17; TR 152-53).

Pesall does not dispute that Applicants presented evidence of economic benefits. (*Id.*). Instead, without citing any authority, Pesall argues the Commission's findings are clearly erroneous because the Commission did not consider the "economic burden" of the Project. (*Id.*). There is nothing requiring the Commission to specifically determine the purported economic burden. *See* SDCL 49-41B-22 (stating the burden of proof for issuing the permit). Furthermore, there was no evidence presented of the dollar value associated with the purported economic burden, and thus, there was no evidence indicating that this burden was greater than millions of dollars in quantified economic benefits. (FOF 21-23). Thus, the Commission's Findings 21 to 23 are not clearly erroneous.

2. *The Commissions Mitigation Plans Findings Are Supported by Substantial Evidence.*

Pesall argues Finding 28 is clearly erroneous. (Pesall's Brief at p.16). Finding 28 addresses the Applicants' plans to mitigate environmental concerns and states:

> As indicated in Sections 9 through 19 of the Application, the Applicants have developed reasonable mitigation plans to mitigate any environmental concerns arising from the construction or operation of the Project. Ex. 1. The Amended Settlement Stipulation also contains conditions, which when complied with by the Project, will mitigate environmental concerns. Ex. 301A. The Commission finds that the Project will not cause serious injury to the environment based on the mitigation measures addressed in the Application and the Applicants compliance with the conditions imposed by the Amended Settlement Stipulation in their construction and operation of the Project.

(FOF 28). Although unclear, Pesall is apparently arguing that Finding 28 is clearly erroneous because he claims the Applicants have to develop a SCN mitigation plan after the issuance of the permit. This argument ignores Applicants' evidence.

Applicants developed and proposed an SCN mitigation plan at the evidentiary hearing. (Ex. 23; TR 34-36, 64-66, 83-85). According to Applicants' SCN Mitigation Plan, Applicants are going to test **every** parcel of cultivated land the Project will cross. The testing is necessary to

determine which, if any, of the parcels have SCN. (TR 34-35; 83-85). Based upon the testing results, Applicants will employ various mitigation techniques, including "cleaning stations, utilizing clean crews for non-affected fields and a dirty crew for affected fields, and weather-dependent construction (*i.e.*, froze and dry soils)." (Ex. 23).

In addition to the SCN Mitigation Plan articulated in Exhibit 23, the Amended Settlement Stipulation added the additional requirement that the Applicants consult with a crop pest control expert when implementing their SCN mitigation plan. (Ex. 301A, ¶ 17). Furthermore, in the Decision, the Commission ordered that a condition of the permit authorizes both the Commission and Commission Staff access to the SCN testing data "to enable the 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." (CR 8332). These modifications of the SCN Mitigation Plan by the Commission further support Finding 28, which is not clearly erroneous.

Pesall also argues that Findings 29 and 30 are clearly erroneous. (Pesall's Brief at p.7). Findings 29 and 30 relate to the mitigation efforts employed by the Applicants to prevent the Project from negatively impacting farming practices. Of these two Findings, Pesall only attacks one sentence in Finding 29, namely: "As discussed in more detail below, no evidence was introduced to demonstrate any effect of the Project on property values." (FOF 29).

Pesall argues Finding 29 is clearly erroneous because both Pesall and Schuring testified the Project would decrease their land values. (Pesall's Brief at p.16). The Commission, however, rejected both Pesall's and Schuring's testimony as speculative. (FOF 53, 69). With this evidence rejected, there was no evidence that the Project would diminish land values. Conversely, the Applicants presented evidence indicating that the Project would not negatively

affect farm land values. (Ex. 1, at § 19.1.2, Ex. 2, at Data Request 1-6; Ex. 4, at Interrogatory No. 2; TR 52-53). Additionally, even if the one sentence in Finding 29 was erroneous, this isolated sentence does not warrant reversal. This Court determines whether the Commission's **decision** was clearly erroneous in light of the entire record. *Big Stone II*, at ¶ 32, 744 N.W.2d at 603. The Commission's rejection of Pesall's unsupportive self-serving devaluation testimony is not clearly erroneous. *See Schneider v. S.D. Dep't of Transp.*, 2001 SD 70, ¶ 14, 628 N.W.2d 725, 728 ("Determining the credibility of witnesses is the role of the factfinder. Where the [Commission] has resolved conflicts in evidence, we cannot change its findings.").

3. The Commission's Findings Rejecting Pesall's Objections to the Project are Not Clearly Erroneous

Pesall asserts that the Commission clearly erred in rejecting his objections to the Project in Findings 35 to 57. (Pesall's Brief at pp.17-20). Essentially, he is arguing that the Commission erred by accepting the Applicants' evidence over Pesall's evidence. The Commission, however, weighs the evidence, and the Commission's choice between two permissible conflicting views of the evidence is not clearly erroneous. *See Schneider*, at ¶ 14, 628 N.W.2d at 728.

Pesall first argues the Commission clearly erred in Finding 36 by determining the Project will not materially impede Pesall's farming practices. (Pesall's Brief at p.17). Pesall argues that the evidence does not support this finding because he claims the only evidence of Pesall's farming practices is Exhibits 21A and 21B showing Pesall's land. This argument ignores substantial evidence in the record about the effect of the Project on farming practices. *See In re Big Stone II*, at ¶ 26, 744 N.W.2d at 602 (stating that this Court reviews findings of fact to determine whether they are supported by the evidence in the record as a whole).

As found by the Commission, the Applicants adopted reasonable measures to minimize the effect of the Project on farming practices, including: using monopoles, placing structures inside the field to allow farming around structures, and creating spans between structures of approximately of 700 to 1,200 feet. (FOF 30). The Commission expressly found that the "construction and maintenance of the Project will not prevent landowners from engaging in reasonable agricultural practices." (FOF 31). These findings regarding the impact of the Project on farming practices are supported by substantial evidence in the record. (Ex. 1, at §§ 10.2.2, 14.1.2, 19.2).

Specific to Pesall, the evidence as a whole does not indicate any unique agricultural practices that would cause his farming practices to be impacted more than other farmers. Exhibits 21A and 21B confirm that only two structures will be placed on the entire quarter section of Pesall's property, which is a wide-open parcel. These structures are only 6 to 11 feet in diameter. (Ex. 1, at § 23.1). The conductor (or line) will be at least 30 feet in the air. (FOF 12). Pesall can reasonably farm around the two mono-poles and under the line, and the Commission's finding is not clearly erroneous.

Pesall also attacks Finding 37, which describes Pesall's motivation as "less an objection to the issuance of the permit than an objection to the placement of the transmission line on his property." (FOF 37). This Finding is directly based upon Pesall's testimony at the evidentiary hearing:

Q. Would you think it was a good idea if they kept [the Project] off your land?

A: It would be a great idea if they kept it off my land. *I would go away and disappear*.

(TR 312). Pesall does not dispute the evidence supports Finding 37. Instead, he argues, without any authority, that the Commission acted improperly in characterizing Pesall's

objections. As the factfinder, however, the Commission was entitled to consider Pesall's motivations when weighing the evidence presented by him. *See Lends His Horse v. Myrl & Roy Paving, Inc.*, 2000 SD 146, ¶ 9, 619 N.W.2d 516, 519 (stating the court does not substitute its judgment for that of the Commission regarding weight of the evidence).

Pesall also claims that several findings of fact regarding SCN are clearly erroneous. Once again, Pesall's attempt to relitigate his factual arguments on appeal must fail:

- Regarding Finding 39, Pesall claims the Commission clearly erred in finding "[i]f Pesall already has SCN, then there is no risk of spreading SCN to Pesall's property through construction." (Pesall's Brief at p.17-18). Pesall argues that construction activities can spread SCN throughout a field, and that on its own, SCN only can move approximately 1 inch. (*Id.*).
    - Pesall's argument ignores that he never presented evidence of whether his fields have SCN because he did not bother testing his own fields before objecting to the Project, and his test results were unavailable at the time of the evidentiary hearing. (FOF 39; TR 282, 303). Thus, as far as anyone knows, **all** of Pesall's fields may be infected with SCN. Indeed, once a field is infected, typical agricultural techniques such as tilling can spread SCN. (TR 244). SCN can also be spread through wind and water erosion. (TR 245). Even birds and animals can spread SCN. (TR 270-71).
- Pesall contends Finding 40 is clearly erroneous. In Finding 40, the Commission found that although SCN is present in Brown, Grant, and Day Counties, there is no evidence indicating whether the specific parcels over which the Project will travel are infected with SCN. (FOF 40).
    - This finding is directly supported by the testimony of Pesall's own expert Dr. Tylka. Dr. Tylka admitted that he does not know "whether any landowner on the proposed line has SCN." (TR 243). This finding cannot be clearly erroneous.
- In Finding 41, Pesall argues the Commission clearly erred in finding "[t]here was no evidence presented that construction of any transmission line caused the spread of SCN." (Pesall's Brief at p.18). Pesall argues the evidence contradicts this finding because Dr. Tylka testified that construction equipment would likely result in greater spread of SCN. (*Id.*).
    - Relying only on Dr. Tylka's opinion that construction **could** cause the spread of SCN, Pesall argues Finding 41 is clearly erroneous. Testimony that construction could spread SCN is different than finding construction of a transmission line **in fact** caused the spread of SCN. There was no evidence presented that

construction has spread SCN in the past. Dr. Tylka admitted there is no academic studies indicating construction of transmission lines spread SCN. (TR 246-47). Nor had Dr. Tylka ever been involved in another case in which he opined a transmission line would spread SCN. (*Id.*). Based on this evidence, Finding 41 is not clearly erroneous.

- In Finding 49, the Commission found that "the 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 inhabitants or expected inhabitants in the siting area and does not warrant denial of the Permit." (FOF 49). Pesall claims this testimony conflicts with Dr. Tylka's testimony that SCN reduces productivity, and that construction activities could cause spread of SCN. (Pesall's Brief at p.19)

    - Pesall's argument completely ignores the mitigation plan proposed by the Applicants and mandated by the Commission. (Exs. 23, 301A). The Applicants also must consult with a crop pest expert in implementing the mitigation plan. (Ex. 301A). The techniques in the mitigation plan will reasonably prevent the spread of SCN. (TR 33-36, 82-85). After hearing all the evidence, the Commission considered the likelihood of the spread of SCN in light of Applicant's mitigation plan and entered Finding 49. This is not clearly erroneous.

Pesall also argues that Finding 53 relating to the Commission's rejection of Pesall's testimony about his land value is erroneous. Pesall argues landowners can opine about their own land values. This argument misconstrues Finding 53. The Commission did not say Pesall could not testify about his land value. Instead, it merely rejected that testimony as speculative. (FOF 53). As the finder of fact, the Commission can reject this testimony, and, as discussed above, this finding is supported by the record.

Pesall attacks Finding 54 that states the transmission line, "which will be designed to be consistent with industry safety standards, will not create health risks for persons below the transmission line." (FOF 54). According to Pesall, the cited testimony indicates there is a risk of fire so there must be health risks. The record as whole, however, supports Finding 54. Jon Leman, an electrical engineer with a master's degree in engineering who taught electrical engineering for the U.S. Navy, testified about the risks associated with being under the transmission line from the associated electromagnetic field ("EMF"). Leman's unrebutted

testimony indicates EMF does not create a safety risk for persons in farm equipment under the transmission line. (TR 192-94; Ex. 20, pp.6-8). Leman admitted that landowners are advised they should not fuel vehicles under the transmission line due to risk of an electrical fire. (TR 196). Leman described this risk as "very similar to a gas station where they recommend don't get in or out of the vehicle." (TR 195). This small fire risk is eliminated by landowners being more than 100 feet from the transmission line when fueling their vehicles. (Ex. 1, at § 23.4.5). As a requirement of the permit, which incorporates the Amended Settlement Stipulation, the Applicants must provide landowners detailed safety information. (Ex. 301, at ¶ 4(b)). This safety information is sufficient to advise landowners not to fuel vehicles under the transmission line. The evidence supports the Commission's finding that the Project will not unduly impair the health of the inhabitants. *See* SDCL 49-41B-22 (stating the requirements for issuance of the permit).

Finally, Pesall argues that Finding 56, which addresses need for the Project, is clearly erroneous. (Pesall's Brief at pp.19-20). As described above, the Commission's findings regarding need are supported by substantial evidence and Finding 56 is not clearly erroneous. (*See supra* Part I.A).

II. The Commission Did Not Clearly Err in Finding Applicants Met Their Burden of Proving Each of the Requirements of SDCL 49-41B-22 Necessary for Issuance of the Permit.

Pesall argues the Commission made two errors when finding Applicants met their burden of proof: (A) the Commission shifted the burden of proof to him; and (2) the Commission erred in finding the requirements of SDCL 49-41B-22 are satisfied. Both arguments should be rejected.

A. Consistent with SDCL 49-41B-22, the Commission Correctly Assigned the Burden of Proof to Applicants

Pesall argues that the Commission shifted the burden of proof in Finding 57, which states: "The Commission finds that none of Intervenor Pesall's objections warrant denial of the permit." (Pesall's Brief at pp. 23-24; FOF 57). The Commission, however, expressly assigned Applicants the burden of proving the requirements of SDCL 49-41B-22. (FOF 77; COL 15). Nothing in Finding 57 changed this express allocation of the burden of proof. Instead, Finding 57 is simply the Commission rejecting Pesall's objections to the permit.

B. Pesall's Attempt to Reargue the Facts On Appeal Fails Because the Commission's Findings That Applicants Proved All of the Requirements of SDCL 49-41B-22 Are Not Clearly Erroneous

Pesall argues that the Commission erred in deciding Applicants met their burden of proof under SDCL 49-41B-22. (Pesall's Brief at pp.20-21, 23-28). Pesall cannot show, however, the Commission's burden of proof findings are clearly erroneous.

As an initial matter, Pesall wrongfully articulates the standard of review. Pesall argues that the Commission's findings that Applicants proved each of the requirements of SDCL 49-41B-22 are mixed questions of fact and law reviewed *de novo*. (Pesall's Brief at p.14).

The seminal decision regarding the standard of review for agency decisions is *Permann v. S.D. Dep't of Labor*, 411 N.W.2d 113 (S.D. 1987). *See also In re Dorsey & Whitney Trust Company, LLC*, 2001 SD 35, ¶ 4, 623 N.W.2d 468, 471 (describing the discussion in *Permann* as clarifying the confusing nature of SDCL 1-26-36 addressing the standard of review). According to the *Permann* Court, "mixed questions of law and fact [are] questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Id.* (quoting *Pullman-Standard v. Swint*, 456 U.S. 273,

289 n. 19 (1982)). In describing what standard of review applies to mixed questions of fact and law, the Court stated:

> In our view, the key to the resolution of this question is the nature of the inquiry that is required to decide 'whether the rule of law as applied to the established facts is or is not violated.' If application of the rule of law to the facts requires an inquiry that is 'essentially factual,'--one that is founded ' *on the application of the fact-finding tribunal's experience with the mainsprings of human conduct,'*--the concerns of judicial administration will favor the district court, and the district court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to *exercise judgment about the values that animate legal principles,* then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

Id. (internal citations omitted).

The South Dakota Supreme Court further addressed when mixed questions of fact and law are reviewed under the clearly erroneous standard in *In re Dorsey & Whitney Trust Co. LLC*, 2001 SD 35, ¶ 6, 623 N.W.2d 468, 471. In *Dorsey Whitney Trust Co. LLC*, there was an administrative hearing regarding whether an application to create a trust company should be approved. At the contested case hearing, the banking commission determined whether the applicant satisfied the four requirements for issuance of a permit under SDCL 51A-6A-5. On appeal, the South Dakota Supreme Court stated that whether the statutory requirements were satisfied was a mixed question of fact and law. The Court nevertheless applied the clearly erroneous standard of review because the Court held the inquiry was "essentially factual in nature." *Id.* The Court determined the issue was essentially factual based on "the factual nature of the inquiry made by the Commission and the factual nature of the arguments in the briefs." *Id. See also Independent Trust Co., LLC v. S.D. State Banking Comm'n*, 2005 SD 52, ¶ 5, 696 N.W.2d 539, 541 (applying clearly erroneous standard to essentially factual mixed question of fact and law); *Rios v. Dep't of Social Servs.*, 420 N.W.2d 757, 759-60 (S.D. 1988) (holding

whether agency met requirements of regulation was mixed question of fact and law but applying the clearly erroneous standard of review because the inquiry was primarily factual).

Like *Dorsey Whitney Trust Co., LLC*, Pesall's argument relating to the burden of proof is inherently factual. During his entire argument about the burden of proof, Pesall never argues that the Commission wrongfully interpreted SDCL 49-41B-22's statutory requirements. Instead, his entire argument is whether the **facts** met the statutory requirements. (Pesall's Brief at pp.23-28). This inquiry is essentially factual, and the clearly erroneous standard of review should apply. In fact, by arguing a *de novo* standard of review governs Pesall's factual arguments, Pesall is essentially asking this Court to wrongfully retry the evidence on appeal. *See Permann*, 411 N.W.2d at 117 ("The agency, after holding a hearing and listening to witnesses, is in a much better position to find facts than are we on appeal.").

Pesall argues the Commission erred in finding Applicants met their burden of proving SDCL 49-41B-22(2), which requires Applicants to prove the Project "will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area." The Commission specifically found this element was satisfied. (FOF 73). Pesall attacks this finding by regurgitating his version of the evidence on three categories of disputed factual issues: (1) spread of SCN; (2) interference with farm activities; and (3) reduction in property values. Regarding each of these categories, the Commission specifically found that the issues did not prevent Applicants from meeting their burden of proof notwithstanding Pesall's arguments and evidence. (FOF 30, 48-49, 53, 57, 77). Pesall cannot show these findings are clearly erroneous.

1. Spread of SCN

At the evidentiary hearing, one of the key issues litigated by Pesall was the effect of the construction and maintenance of the Project, if any, on the spread of SCN. As described above, the Commission's findings regarding the risk of spreading SCN are not clearly erroneous. (*See supra* Part I.B.) As a result, Pesall's argument the Commission erred in denying the permit based upon the spread of SCN must be rejected.

Pesall argues the SCN mitigation plan as too vague. (Pesall's Brief at p.25). Pesall never proposed, however, a competing mitigation plan. (FOF 45). Further, as described above, the SCN Mitigation Plan is intentionally vague to allow flexibility in selecting the mitigation technique based on testing results for the various parcels. (TR 84-85). The Commission has the ability to review the testing and confirm the appropriate mitigation techniques are being employed. (FOF 47). Thus, the mitigation plan is not too vague, and the Commission's findings are supported by the evidence.

2. Interference with Farming Activities

In addition to SCN, Pesall argues that the Project's interference with farming activities require denial of the permit. (Pesall's Brief at pp.25-28). Rearguing his "facts" only, Pesall contends that several aspects of the line cause interference with farming activities. Pesall completely ignores, however, that the Commission expressly found that "the effect of the facility on agricultural practices . . . will not cause serious injury to the social and economic condition of inhabitants and expected inhabitants in the siting area." (FOF 29). The Commission explained in detail why the Project, as permitted, will not cause substantial injury to farming practices. (FOF 30-33, 53, 54-55).

The Commission's Findings regarding the effect of the Project on farming practices are supported by substantial evidence. Applicants have taken considerable steps to mitigate the effect of the Project on farmers. These mitigation efforts are described in detail in § 19.2 of the Application and the conditions in the Amended Settlement Stipulation. (Ex. 1, at § 19.2; Ex. 301A).

Regarding Pesall's specific allegations of interference with farming, several of his objections are speculative. As it relates to liability arising from collisions with farm equipment, it is speculative whether: (1) any such collision will occur; and (2) even if the collision occurs, whether the landowner (who has no involvement in designing or placing the transmission line) would have any liability whatsoever. Other than Pesall's purported "concerns" about liability, there is no evidence that this will in fact expose farmers to liability.[5]

Similarly, regarding aerial spraying, there is no evidence of the effect of the Project on any landowner other than Pesall's claim it would prevent spraying on his land. Conversely, Applicants have presented evidence that the Project will not prevent aerial spraying. (Ex. 3, at Data Request 2-27).

Regarding the handling of fuel, it is recommended that landowners not refuel equipment within **100 feet** of the line due to risk of a fire. (TR p.195). The risk is similar to the recommendation at a gas station that persons do not get in and out of a vehicle when refueling. (*Id.*). As described above, this safety risk is mitigated by the requirement Applicants provide detailed safety information to landowners. (Ex. 301A, at ¶ 4(b)). Furthermore, requiring landowners to be more than 100 feet away from the transmission line when fueling their equipment or vehicles is not a significant burden. This limited burden will not cause a **serious**

[5] Applicants responded to a data request from the Commission Staff about increased liability and explained why the proposed facility will not increase liability. (Ex. 3, at Data Request 2-21).

injury to the economic condition of the inhabitants. *See* SDCL 49-41B-22(2). Nor will it **substantially impair** the health, safety, or welfare of the inhabitants. *See* SDCL 49-41B-22(3).

The alleged loss of crop insurance premiums is similarly speculative. There is no expert testimony about the effect of lost acreage on crop insurance policies. Nor is there any evidence indicating the amount, if any, that the insurance payments would decrease. Finally, even assuming that a reduction in acreage or yield as a result of Project construction would decrease the possible insurance payments, it is speculative of whether any loss will occur that would trigger a crop insurance payment affected by a reduction in acreage or yield from Project construction. Thus, the crop insurance issue is mere speculation, and it did not warrant denying the application.

Furthermore, even if damaged crops during Project construction does decrease yields and in turn diminish future crop insurance payments, landowners are being compensated for this crop damage. In calculating the crop damage payment, Applicants will multiply the yield lost per acre times the number of acres damaged times the price per bushel/ton. Applicants then pay landowners double the damage amount determined based on this formula. (Ex. 5, at Interrogatory No. 6). These payments further mitigate or eliminate the alleged decrease in future crop insurance payments.

Pesall contends that accommodating the presence of the transmission line will increase overhead and time lost. (Pesall's Brief at p.26). As an initial matter, if "inconvenience" was sufficient to deny the permit, no project would be able to be built. Inconvenience, however, is not the standard under SDCL 49-41B-22 for determining whether a facility permitted should or should not be issued. Other than a conclusory allegation of increased overhead and lost time, there is no explanation in Pesall's brief on the magnitude of the effect of any accommodation for

the presence of the line. If Pesall is referring to the need to "farm around" the transmission line, as described above, the Project has designed the line to minimize the impact for farmers. (FOF 30).

Pesall also argues that the Project's alleged interference with farming will "unduly interfere with the orderly development of the region" in contravention of SDCL 49-41B-22(4). As discussed above, the impacts to farming are minor, and this is not an undue burden on the region.[6] To the contrary, based on evidence that the line will improve electric service reliability to customers and offer the opportunity for development of wind generation in northeastern South Dakota, with only minor impacts on farming operations, the line promotes rather than interferes with orderly development in the region.

In short, after hearing all Pesall's objections and evidence, the Commission found that Applicants met their burden of proof, and the Applicants mitigation efforts minimize the impact of the Project on farming practices. (FOF 73-77). Because these findings are not clearly erroneous, the Decision should be affirmed.

3. Devaluation of Land

Pesall argues the Commission erred in rejecting his alleged devaluation of land as a basis for denying the permit. (Pesall's Brief at p.28). As described above, the Commission weighed the competing evidence and rejected Pesall's unsupported testimony as speculative. Pesall cannot ask this Court to reweigh this evidence of appeal, and the Commission's findings are not clearly erroneous. *See Permann*, 411 N.W.2d at 117 ("The agency, after holding a hearing and

[6] Pesall notes that all local governments who provided written comments opposed the project. He is referring to comments provided from three local townships, which raised the similar agricultural concerns as Pesall. (Pesall's Brief at pp.26-27). Despite being advised of the Project, none of the other following local governments communicated any opposition to the Project: Brown County, Grant County, Day County, City of Frederick, City of Twin Brooks, City of Westport, City of Groton, City of Andover, City of Butler, Big Stone City, and City of Milbank.

listening to witnesses, is in a much better position to find facts than are we on appeal."). The Commission thus did not err in finding Applicants met their burden of proof.

III. The Commission Did Not Abuse Its Discretion in Admitting the MISO Studies.

The Application was admitted as Exhibit 1 at the hearing. Pesall stipulated to admission of the Application except for Exhibit 4 attached to the Application and Appendices B1 through B4 of the Application. These are referred to as the "MISO Studies."

The admissibility of evidence before the Commission is governed by SDCL 1-26-19(1), which states:

> Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

SDCL 1-26-19 is based upon § 10 of the Model State Administrative Procedures Act ("Model APA"). Compared to civil courts, administrative agencies have more liberal rules of evidence. *See Kostrzewski v. Comm'r of Motor Vehicles*, 727 A.2d 233, 239 (Conn. Ct. App. 1999) (stating that "administrative tribunals are not strictly bound by rules of evidence" under the Uniform Administrative Procedures Act); *Robertson v. Tenn. Bd. of Social Work Certification and Licensure*, 2005 WL 3071571, at *5 (Tenn. Ct. App. 2005), affirmed, 227 S.W.3d 7 (Tenn. 2007); *Grubbs Nissan Mid-Cities, Ltd. v. Nissan N. Am., Inc.*, 2007 WL 1518115, at *10 (Tex. Ct. App. 2007). Unlike a lay jury, the Commission is particularly well equipped to evaluate the weight to be given to evidence in its area of expertise, such as the MISO Studies here. *See*

Washington Post v. D.C. Dep't of Employment Servs., 675 A.2d 37, 44 (D.C. 1996). Additionally, because there is no "jury to shield," flexibility and discretion is given to the administrative agency in admitting evidence. *See id. See also DePasquale v. Harrington*, 599 A.2d 314, 316 (R.I. 1991) (stating that § 10 of the Model APA follows the standard stated in the federal administrative procedures act, and that lack of jury enables admission of hearsay in administrative proceedings). The Commission's admission of the MISO studies is subject to the abuse of discretion standard. *Dubray v. S.D. Dep't of Social Servs.*, 2004 SD 130, ¶ 8, 690 N.W.2d 657.

Even if the Commission wrongfully admitted the MISO studies, reversal is only appropriate if Pesall shows his "substantial rights were effected." *Id.* at ¶ 25, 690 N.W.2d at 666. Reversal is not warranted if admission of the evidence does not cause prejudice because it is cumulative of other admissible evidence. *See Vivian Scott Trust v. Parker*, 2004 SD 105, ¶¶ 14-15, 687 N.W.2d 731, 737-38.

The Commission found the MISO Studies are admissible under the exception in SDCL 1-26-19. (COL 14). These requirements for admission are satisfied. Weiers testified, and Pesall does not dispute, that the MISO Studies were reasonably relied upon by utilities. (TR 106). Instead, Pesall says there is no evidence indicating why someone from MISO could not testify. Pesall ignores that Weiers, as a witness who directly participated in the MISO studies, did testify. If Weiers, who was present to lay foundation for these public records, is not sufficient, then the facts are not susceptible to proof because it is uncertain how the evidence could be admitted. Given the liberal rules of evidence applicable to administrative proceedings, the Commission did not abuse its discretion admitting the MISO Studies.

Even if the more restrictive rules of evidence for civil courts apply, the MISO Studies were admissible. Pesall argues the Commission wrongfully admitted the MISO Studies for lack of foundation. (Pesall's Brief at p.21). The MISO studies needed to be authenticated. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." SDCL 19-17-1 (Rule 901). Among other ways, the rules of evidence expressly recognize that documents can be authenticated by "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." SDCL 19-17-1(1) (Rule 901). Weiers, who is a representative of OTP which is a member of MISO, testified he was involved in the MISO Studies involving the Project from their "inception to their conclusion." (TR 108). He testified these are true and accurate copies. (*Id.*). This is sufficient to lay foundation. *See Jones v. National American University*, 608 F.3d 1039, 1045 (8th Cir. 2005) (internal quotation omitted) (""The party authenticating the exhibit 'need only prove a rational basis for that party's claim that the document is what it is asserted to be.'").

In addition, the MISO studies are public records filed with Federal Energy Regulatory Commission ("FERC") which has regulatory jurisdiction over MISO and the applicants. General Counsel Smith, as the hearing officer, expressly stated that the MISO Studies are publicly available, official documents filed with FERC regarding FERC's order approving the MISO MVP portfolio. (TR 109). This is sufficient evidence to authenticate these public documents. *See* SDCL 19-17-1(7). In fact, the Commission could take judicial notice of the FERC regulatory file, including the MISO Studies. *See Jenner v. Dooley*, 1999 SD 20, ¶ 15, 590 N.W.2d 463, 470 (stating the court can take judicial notice of public records, including filings in other prior judicial proceedings).

Pesall also argues the MISO Studies are inadmissible hearsay. Pesall failed, however, to preserve his hearsay objection. Pesall objected based on foundation rather than hearsay when he argued the MISO Studies were inadmissible because Weiers was not the custodian of the records. (TR 108-109). Pesall's counsel also referenced "certified copies" and "keeper of the records," which confirms his objection was based upon foundation. (TR 107, 109). *See also Andrushchenko v. Silchuk*, 2008 SD 8, ¶¶ 10-11, 744 N.W.2d 850 (describing testimony from a record custodian or other qualified witness needed to lay foundation for documents). Indeed, when admitting the MISO Studies, the Commission also understood the objection to be based upon foundation and not hearsay. General Counsel Smith, who was acting as the hearing officer, stated the MISO studies are "sufficiently foundationally reliable to warrant admission." (TR 109). Pesall's objections to foundation are not sufficient to preserve his hearsay objection. *See State v. Iron Shell*, 336 N.W.2d 372, 374 (S.D. 1983) (stating that objection to testimony on other basis did not preserve hearsay objection raised on appeal for the first time).

Even if the hearsay objection was preserved, the MISO studies are not inadmissible hearsay. The MISO studies are admissible under the public records exception to the hearsay rule. *See* SDCL 19-16-12 (Rule 803(8)). Additionally, the MISO Studies are admissible as the basis for expert opinions. Jason Weiers, a planning engineer, testified as an expert witness regarding the need and benefits for the Project. (Ex. 5, at Interrogatory No. 2; Ex. 17, at pp.29-33). In forming his opinions, Weiers relied upon the MISO studies, which he testified are reasonably relied upon defining future transmission needs. (Ex. 17; TR 105-07). As an expert, Weiers can rely upon inadmissible hearsay in forming the basis for his expert opinions. *See* SDCL 19-15-3 (Rule 703); *First Premier Bank v. Kolcraft Enters., Inc.*, 2004 SD 92, ¶ 39, 686 N.W.2d 430, 448 (superseded by court rule on other grounds). As a basis for Weiers' opinions,

the Commission has discretion to admit the MISO Studies even if hearsay. *See* SDCL 19-15-3 (Rule 703).

Finally, even if the Commission erred in admitting the MISO Studies themselves, Pesall cannot show this ruling substantially affected his rights. In addition to the MISO Studies, the Applicants offered extensive evidence of need for the Project. (Ex. 1, at §§ 4.0, 6.0-6.2; Ex. 2, at Data Request 1-1, 1-5, Ex. 3, at Data Request 2-4; Ex. 4, at Interrogatory Nos. 7-9; Ex. 5, at Interrogatory No. 10; Ex. 17; TR 104-07). All of this other evidence, much of which describes the same facts as the MISO Studies, was admitted without objection. Thus, the MISO Studies are cumulative, and Applicants cannot show prejudice in admitting the MISO Studies. *See Vivian Scott Trust*, at ¶ 15, 687 N.W.2d at 737 (refusing to reverse for wrongfully admission of document that was cumulative of other evidence).

IV. Pesall Relies on A Repealed Statute to Argue the Commission Wrongfully Delegated its Authority to Set the Conditions of the Permit.

Relying on SDCL 49-1-17 and *Application of Nebraska Public Power Dist.*, 354 N.W.2d 713 (S.D. 1984), Pesall argues the Commission improperly delegated its authority to place conditions on the permit by adopting Finding 47 relating to the SCN Mitigation Plan. (Pesall's Brief at p.47). SDCL 49-1-17 has been repealed. Thus, neither this statute nor *Application of Nebraska Public Power Dist.*, which relied on SDCL 49-1-17, can form the basis for error.

Finally, even if SDCL 49-1-17 remained valid, the Commission did not delegate its authority to set conditions of the permit in Finding 47, which states:

> After Applicant has 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, Applicant shall submit to the Commission a summary report of the results of the field assessment and Applicant's 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 Applicant confidential access to the survey results to enable the 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.

(FOF 47). In *Application of Nebraska Public Power Dist.*, the Commission granted landowners carte blanche authority to set conditions of the permit. Here, the only conditions of the permit relating to the SCN Mitigation Plan are stated in Ex. 23, the Amended Settlement Stipulation, and Finding 47. No one has authority to set additional conditions of the permit. As a matter of compliance, the Commission and its staff can verify that Applicants are appropriately mitigating based upon the mitigation techniques described in the Mitigation Plan in Ex. 23. The Commission did not delegate its authority.

V. The Commission Complied with Its Obligation to Rule within 12 Months of the Filing of the Application.

Within 12 months after receiving the Application for the facility permit, SDCL 49-41B-24 required the Commission to "make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate." The Commission complied with that obligation. The Application was filed on August 23, 2013. (CR 13-851). The Commission filed its decision granting the Permit on August 22, 2013. (CR 8324-8341). Thus, the Commission issued its decision within one year.

Presumably referring again to Finding 47, Pesall argues that the Commission's finding regarding the SCN Plan increased its ability to write conditions after the one year deadline. This Finding does not, however, grant authority to impose additional conditions. Instead, as described above, Finding 47 empowers to the Commission to enforce compliance with Applicant's SCN Mitigation Plan.

CONCLUSION

Based on the foregoing, Applicants respectfully request the Court affirm the Decision and adopt the Commission's findings of fact and conclusions of law as this Court's findings of fact and conclusions of law.

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