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 REPLY BRIEF

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PRELIMINARY STATEMENT

Gerald Pesall submits the following Reply Brief pursuant to S.D.C.L. 1-26-33.2 et seq. As in his original 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. Reference to the brief submitted by Montana Dakota Utilities and Otter Tail Power will be designated "Applicants' Brief." References to the brief submitted by the South Dakota Public Utilities Commission will be designated "Commission's Brief." Any references to other materials will be by name and page number where appropriate.

STATEMENTS OF JURISDICTION, FACTS, AND ISSUES

For this reply brief, except as expanded-upon or clarified herein, Gerald Pesall relies on the statements of jurisdiction, facts, issues and arguments set out in the original Appellant's Brief.

ARGUMENT

Initially, we must note that Applicants' Brief states and numbers the issues differently than the Commission's Brief, Gerald Pesall's Brief, and the original Statement of Issues on Appeal. For clarity and consistency, the following reply brief continues to follow the issues as originally outlined.

It is also necessary at the outset to correct the Applicant's claim that Gerald Pesall's appeal is primarily factual. As set out in his Statement of Issues on Appeal, Issue 1 is primarily factual. Issue 2 raises a mixed question of law and fact. Issues 3 through 6 all address legal errors made by the commission as they relate to the admission of evidence, the burden of proof, the delegation of authority, and the violation of the one-year decision deadline.

1. Whether the Commission's Findings of Fact are Clearly Erroneous

Both the Commission and the Applicants make similar arguments as to the findings of fact at

issue in this appeal. Applicants also argue that, because Gerald Pesall stated his objections to the proposed findings of fact in his post-hearing brief, rather in a separate post-hearing document captioned "objections," this deprives him of the opportunity to challenge clearly erroneous findings on appeal. The Commission does not present this argument, and it is without merit.

The Commission required briefs to be filed, but did not require proposed findings of fact. "[S]imultaneous initial briefs from all parties and ***any*** proposed findings of fact and conclusions of law [will be] due on or before July 18, 2014, and simultaneous rebuttal briefs due on or before August 1, 2014." (Prehearing Conference Order, p. 3, emphasis added.) In hearings before the Commission, briefs and proposed findings are both filed and become part of the record in exactly the same way. A.R.S.D. 20:10:01:25. On pages 3-8 of his Rebuttal Brief, Gerald Pesall stated that he "opposes the Applicants' Proposed Findings of Fact and Conclusions of Law as a whole." He went on to provided specific arguments on the individual findings. He has, thereby, preserved the issue for appeal.

Turning to the erroneous findings of fact themselves, if there is a single, unifying problem with them, it is that they tend to be blanket statements which are either not supported by the record or conflict with other parts of the decision. Both the Commission and the Applicants, in their briefs, urge this Court to allow those findings to stand, even where this requires interpreting them to mean something other than what their plain language says.

Each finding of fact must be supported by the record. *Bayer v. PAL Newcomb Partners*, 2002 SD 40, 13, 643 N.W.2d 409. A finding of fact which is not supported by the record is clearly erroneous. *Id*. The appropriate remedy where findings of fact are contradictory is to remand the matter to the lower tribunal for additional findings and conclusions. *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶¶35-37 827 N.W.2d 859. In this case, there are myriad findings which

are either unsupported, contradict the record, or contradict each other.

Findings number 40 and 41, for example, assert that there is "no evidence" that any affected landowners do or do not have SCN, or that construction of transmission lines would cause the spread of SCN. Dr. Tylka testified both that SCN has been found in the county where those landowners reside, and that construction efforts would likely cause the spread of SCN. At a minimum, this is circumstantial evidence indicating that at least some of the landowners at issue probably have SCN. It is therefore error to say that there is "no evidence." The Commission could potentially have found that a preponderance of the evidence contradicted Dr. Tylka, or that the risks he described were not significant, but it is simply incorrect to find that "no evidence" exists.

Another example is finding number 49, wherein the Commission stated 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..." This finding contradicts Finding of Fact 47 and the Commission's subsequent order(s), both of which require the Applicants to take steps to mitigate the spread of SCN. If the risk of spread of SCN does not pose a threat of serious injury to the environment, it does not follow, that a mitigation plan needs to be adopted.

Similar problems exist with all of the findings identified in the Statement of Issues herein. This Court should not attempt to reconstruct these findings for the benefit of the Applicants, because it is not the role of this court to determine the facts. Rather, it should simply reverse the Commission on its erroneous findings and remand the matter for further proceedings.

Under Issue 1(a) the Commission and the Applicants also argue that "need" is not an element of 42-41B-22. While need is not specified as an element in the statute, it is an essential fact which the Commission must weigh against the intrusiveness of the proposed line in order to determine whether

there is "undue" impact, and the "acceptability of the possible threat." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶35, 744 N.W.2d 594.

Under issue 1(d) the Commission also argues that it can take judicial notice of its own prior decisions. While it might have taken judicial notice during its own proceedings, the Commission did not do so. It cannot do so now, because its Final Decision and Order has already been issued. And, S.D.C.L.19-10-5 requires that parties be given the "opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." The Commission could take judicial notice of certain facts on remand, but in so doing it must give Gerald Pesall notice and the opportunity to be heard. In the original proceeding this was not done.

2. The Commission Improperly Admitted the MISO Studies

The underlying problems with the admission of the MISO lie both in hearsay and foundation: They are un-signed, un-sworn documents which were not prepared by any party or witness, and which were offered to prove the truth of the matters they assert. And, they were offered in uncertified form by a person who was not their custodian. S.D.C.L. 1-26-19 and *Dail v. South Dakota Real Estate Comm.*, 257 N.W.2d 709 (S.D. 1977), establish a clear two-part test for admitting documents like these into evidence. The record must show both that the the facts are not reasonably susceptible to proof under the rules of evidence, and that the documents are of a kind relied upon by reasonably prudent persons. There is nothing in the record to support a finding on the first half of that test, that is, why the facts alleged in the MISO studies would not be established by following the rules.

On this issue, Applicants urge the Court to divert from settled law in SD on the apply administrative evidence standards adopted by the courts in several other states and the District of

Columbia. (Applicants' Brief, p. 32-33.) The Court should reject this argument and continue to apply South Dakota law as it is currently established by *Dail*, supra.

Applicants argue that the admission of the MISO studies did not impact substantial rights with respect to Gerald Pesall. This argument must fail in light of the record. The studies themselves are foundational to the proceeding, much of the other testimony given was based upon them, and the Commission relied upon them in making it's decision. By admitting the studies, and granting a permit based upon them, the Commission substantially impacted not only Gerald Pesall's property rights but also his procedural right to cross examine witnesses as an intervening party under S.D.C.L. 49-41B-17.

Applicants go on to discuss whether Mr. Weirs' testimony was sufficient foundation. It must be, they contend, because "He testified these are true and accurate copies." (Applicant's Brief p. 34, citing TR, p. 108.) This is not what Mr. Weiers actually said. When asked if the exhibits were "true and accurate replications" of the studies, he stated that "Through my participation in the studies and my review of the final study reports, I do agree with the studies and believe they are accurate." Either way, this argument too must fail. Mr. Weiers was not a MISO employee. He did not prepare the studies, and he did not even confirm that the ones offered were true and accurate copies. Under *Dail*, The law requires evidence as to why actual MISO employee witnesses could not testify, and the record contains none.

Next, Applicants and the Commission argue that the Commission could have taken judicial notice of the studies because they were filed by MISO with the FERC. In support of this argument, both rely on *Jenner v. Dooley*, 1999 SD 20. This judicial notice argument suffers from the same notice and hearing flaws discussed in 1(d), above. The Commission did not take such notice during the hearings, and doing so now would deprive Gerald Pesall of his right to a hearing on the propriety of

that notice In addition, *Jenner* was a habeas corpus proceeding in which the court took notice of filings in the lower court proceedings before dismissing the claim without a hearing. The *Jenner* court did not, as urged by the applicants, take notice of public records filed with a non-party regulatory agency by another non-party. To expand the reasoning in Jenner to proceedings like this one would render existing statutes on the handling and authentication of public records as evidence, including most of S.D.C.L. Chapter 19-17, moot.

Finally, Applicants also argue that Gerald Pesall did not preserve the hearsay issue for review because he did not specifically identify that as the grounds for his objection at the hearing. To preserve an objection to an evidentiary ruling for review on appeal, a party must make the objection and state the basis unless that basis is already "apparent from context." S.D.C.L. 19-9-3(1).

In this case, even though the word "hearsay" was not used, the context of the objection he raised made the both hearsay and foundational issues clear. In support of the objection Counsel argued that the witness did not prepare the documents, that he was not their custodian, that they were not certified, and that "just because they're published on the internet doesn't mean that they're reliable." TR, pp. 107, 109. (Public records offered by someone other than the custodian must be certified pursuant to S.D.C.L. 19-17-5 before they can be admitted under the public records hearsay exception in S.D.C.L. 19-16-12.)

In this context, the hearsay nature of the objection was clear, and Applicants' argument to the contrary must fail.

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

Initially, Applicants argue that the standard of review here is *clearly erroneous* rather than *de novo.* Applicants support this claim by noting that the Commission issued findings of fact that the

Applicants had satisfied their burden of proof and insisting that those findings are not clearly erroneous. (Applicant's Brief, p. 25) Presumably, Applicants refer to Findings of Fact 75-80.

As stated in the original Statement of Issues, the actual points being appealed in Issue 3 are Conclusions of Law 15 and 16. Applicants did not address the merits of Conclusions of Law 15 and 16 in their brief. Therefore, at least as to the Applicants, that issue could be deemed waived pursuant to S.D.C.L. 1-26-33.3(2). "Any issue not presented in the brief is deemed waived."

Assuming that the Court will consider the Applicants' argument anyway, that argument is still incorrect. Certainly, the Court has applied a clearly erroneous standard of review to mixed questions of fact and law, on occasion, but in each of these, the mixed question was "essentially factual in nature." (Applicants' Brief, p. 26, quoting *In re Dorsey & Whitney Trust Co. LLC*, 2001 SD 35, 623 N.W.2d 468.)

By contrast, as recently as 2013, while considering another administrative agency appeal, our Supreme Court noted that "mixed questions of law and fact require further analysis," and that "If ... 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 question should be classified as one of law and reviewed de novo." *Easton v. Hanson School Dist. 30-1*, 2014 SD 30, ¶7, 829 N.W.2d 468, quoting *Darling v. W. River Masonry, Inc.,* 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366 and *Reetz v. Lutheran Health Sys.,* 2000 S.D. 74, ¶ 14, 611 N.W.2d 230.

In this case, the points challenged are conclusions of law regarding the burden of proof under S.D.C.L. 42-41B-22. Through his appeal, Gerald Pesall is asking this court to examine what constitutes "undue interference," "substantial impairment," or "a threat of serious injury" in light of the evidence presented. Although Gerald Pesall is also challenging facts related to the issue, within this

issue he is asking the Court to exercise judgment about how S.D.C.L. 49-41B-22 should be interpreted. This is ultimately a legal question, and the appropriate standard of review is de novo.

Turning to issue itself, the Applicants and the Commission complain that Gerald Pesall never proposed a competing mitigation plan, (Applicants' Brief, p. 28), and that he has not provided the results of his soil testing to the Commission following the hearing, (Commission's Brief, p. 7.) Gerald Pesall's position throughout the proceedings has been that the proposed line would not meet the standards in S.D.C.L. 42-41B-22, would do more harm than good, and should not be built. It would be redundant, even absurd for him to also submit a document captioned "mitigation plan" that proposes to mitigate the spread of SCN by not building the line. Neither the Commission nor the Applicants actually asked Mr. Pesall to submit the results of his soil testing when completed.

That aside, the Commission and the Applicants do not reach the ultimate argument Gerald Pesall makes on this issue. Even if the risk of SCN transmission, or the interference with farming practices, or the devaluation of property are factors which do not individually rise to the level of harm proscribed by S.D.C.L. 49-41B-22, in the aggregate they do. The Commission failed to address this in making conclusions number 15 and 16.

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

At issue here is whether the Commission improperly placed a burden of proof on the Intervenors as set out in Conclusion of Law 18. That conclusion states, "The Intervenors have not presented evidence sufficient to deny the permit under the applicable statutes and Commission regulations." Gerald Pesall contends that the evidence should be considered as a whole, and that the burden of proof remains with the Applicants throughout the proceeding. Against this point, the Commission argues for an oscillating burden of proof. To whit, once the Commission finds that the

Applicants have met their burden of proof through a *prima facie* showing of the requirements of S.D.C.L. 42-41B-22, the burden shifts to the Intervenors refute it. (Commission's Brief, p. 10) Setting aside the logistical problem this approach would create, settled law supports Gerald Pesall's position.

"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." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶26, 744 N.W.2d 594, quoting *Tebben v. Gil Haugen Const. Inc.*, 2007 SD 18, ¶15, 729 N.W.2d 166. If the reviewing Court must consider the evidence in its totality, it follows that the Commission should do so in making the initial decision.

Applicants also appear to argue this point, but misstate both the issue and the challenged portion of the Commission's Decision. (Applicants' Brief, p. 25) At issue is Conclusion of Law number 18, not Finding of Fact number 57 as argued by the Applicants.

5. The Commission Improperly Delegated its Authority

On the delegation issue, both the Commission and the Applicants correctly note that S.D.C.L. 49-1-17 was repealed in 2009. The undersigned counsel acknowledges that oversight. That said, the delegation issue is not limited to the statute which criminalized it.

S.D.C.L. 49-1-17 was repealed by the legislature in 2009 through Senate Bill 62 (SB62). But the legislative history of that bill, and the other statutes which bind the Commission, make it clear that the legal prohibition against delegation of Commission authority remains sound.

SB62 was introduced at the request of the South Dakota Public Utilities Commission. It passed the Senate Energy Committee, and the full Senate without opposition. Upon transmission to the House, it was assigned to the the State Affairs Committee, and came on for a hearing on March 4, 2009. *South Dakota Legislature, 2009 Session – Bill History*

<http://http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=62&Session=2009>. This hearing is the only proceeding for which an audio recording was preserved.

<http://sdpb.sd.gov/SDPBPodcast/2009/hst32.rm> at 00:26:49.

At that hearing, Rolayne Wiest, an attorney for the Public Utilities Commission, testified on behalf of the Commission. No other testimony or discussion took place, so Wiest's words on behalf of Commission constitute the entire legislative history for the bill. They read as follows:

> "Good morning again, Rolayne Wiest with the PUC. With Senate Bill 62 the Commission is seeking to repeal 49-1-17, and this statute makes it a class 2 misdemeanor for the PUC to delegate its powers or authorities to any other person unless we have been given express authority. I did search through our other state statutes and, I could have missed it, but I was unaware of any other agencies that have a similar statute that actually makes it a crime to delegate its powers.
>
> And I would also like to emphasize that this would not mean that the Commission would then be able to delegate its powers in violation of its statutory authority. What would happen is that if someone had … had a claim that the Commission had delegated its power, the Court could still find that there was an impermissible delegation. And what the Court would do, it would look at the Commission's existing statutory authority in order to determine that.
>
> The only case that we're aware of where the PUC was found to have unlawfully delegated its authority was in the MANDAN case in 1984. And in that case the … a court found that the PUC unlawfully delegated its authority when it allowed landowners to chose among different topsoil procedures.
>
> Its just our opinion that this is not the type of activity that should be subject to criminal penalty. Thank you."

This testimony makes it clear that SB62 only repealed the criminal penalty for delegation of powers. It did not authorize the delegatio of authority, and this Court retains is authority to review cases where unauthorized delegation takes place. Wiest's reference to the "MANDAN" case is actually a reference to *Application of Nebraska Power Dist.*, 345 N.W.2d 713 (S.D. 1984). The transmission line in that case was called the "MANDAN Trans-State Transmission Facility." That case is still good

law.

It is also important to note that in the *Application of Nebraska Power Dist.* the court did not rely solely on 49-1-17 in determining that the delegation of authority was unlawful. Rather, in stated, "S.D.C.L. 49-41B-24 dictates that the PUC is the only body which can impose terms and conditions. Because no other statute expressly states that landowners can dictate topsoil restoration conditions, the PUC unlawfully delegated its authority." *Id*, at 719. S.D.C.L. 49-41B-24 is still on the books, and it is still unlawful for the Commission to delegate its authority to private parties.

There are sound reasons for the rule against delegating Commission authority to private parties. By requiring authority to be exercised by the Commission, the rule prevents private parties who would receive that authority from using it to the disadvantage other private parties with opposing interests. Further, the rule protects the public's right to open government. S.D.C.L. 49-1-12 specifically requires that "Every vote and official action of the Public Utilities Commission shall be entered of record and its proceedings shall be open to the public as prescribed in chapter 1-25." It also protects the public's right to weigh in at public hearings as required by S.D.C.L. 49-41B-16, and to intervene as parties under S.D.CL. 49-41B-17. If the Commission could delegate its authority to a private party, these rights would be rendered moot.

In the context of this case, the purpose of the mitigation plan is to protect landowners. The Commission delegated the authority to write that plan to the Applicants. This creates an inherent conflict, because the interests of the Applicants and the landowners are opposed. Applicants will have a financial incentive to minimize the cost of implementing the mitigation plan. By contrast, landowners have a financial interest making sure the plan is as robust as possible. If the authority delegated to the Applicants is allowed to stand, the landowners will have no mechanism by which to be

heard when concerns about the plan's design or shortcomings arise.

Against this, the Commission argues that the Court would not reach the *Application of Nebraska Power Dist.* conclusion today, with "thirty years of administrative law experience now under the Court's belt." (Commission's Brief, p. 11) And, the Commission argues, it has given permittees and landowners certain rights after the issuance of permits in many other recent cases. But those cases are not before this Court, and the Commission cites no law to support of its contention that it is free to delegate authority in this way.

Finally, the Applicants argue that even if the delegation of authority is unlawful, the Commission did not actually delegate its authority in this case, because the provisions of Finding 47 contain some requirements for Applicants to follow in drafting their SCN Mitigation plan. This argument too must fail. In the *Application of Nebraska Power Dist.* case, the Commission delegated to landowners the authority to chose from a menu of specifically identified options for the handling of topsoil. This was unlawful. In the current case, the Commission delegated the authority to Applicants to draft their final mitigation plans after consulting with an expert and testing fields. This open-ended delegation, this is much broader than the delegation of authority the *Application of Nebraska Power Dist.* case, and should be found unlawful for the same reasons.

6. The Commission Exceeded the Twelve Month Limit

Here, the Applicants and the Commission correctly note that the Final Decision and Order was issued on August 22, 2014, but do not address the actual issue. S.D.C.L. 49-41B-24 requires the Commission, to make "compete findings in rendering a decision" and thereby set out all of the permit conditions, within twelve months. The SCN mitigation provision in the Final Decision and Order leaves a permit conditions unwritten until a date long after the twelve-month deadline. If it is not a

delegation of authority as outlined above, then what the Commission has done in issuing this order is to extend that deadline beyond twelve months. Because the law prohibits this, the Commission should be reversed accordingly.

CONCLUSION

This Court should reverse the Commission's findings of fact when they are either not supported by the record or where, in light of the whole record, it is clear that a mistake has been made. All of the challenged findings fall into one of these two categories.

The Court should reverse the Commission's decision to admit the MISO studies into evidence because, in light of the record, the Commission could not make the required findings as to whether the material was susceptible to proof under the rules of evidence.

The Court should reverse the Commission's legal conclusions as to the Applicant's burden of proof because it did not correctly apply that burden to the facts in this case, particularly as it relates to the undue interference.

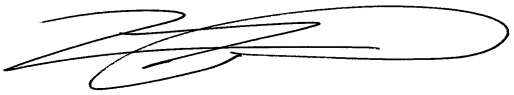
The Court should reverse the Commission's legal conclusion that a burden off proof is born by the Intervenors once the Applicants have made a *prima facie* case, because the Commission must consider all of the evidence, as a whole, and then determine whether the a preponderance of that evidence meets the elements of S.D.C.L. 42-41B-22.

Finally, the Court should reverse the Commission's decision to delegate to the Applicants the authority to draft the final SCN mitigation plans because the Commission cannot lawfully delegate its authority to impose permit conditions to a private party.

Or in the alternative, if it is determined that the Commission somehow retained its authority to impose permit conditions with respect to the SCN mitigation plan, the Court should reverse the

Commission's decision because the drafting of the mitigation plan as a condition of the permit, after August 23, 2014, violates the statutory one-year limit..

Dated this 15th day of December, 2014



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